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EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1342.

HUGH BUTLER AND CHARLES W. WRIGHT, PLAINTIFFS IN ERROR,

vs.

DAVID A. GAGE AND NATHAN S. HURD, EXECUTORS OF WILLIAM P. LINN, DECEASED, AND LEWIS C. ROCKWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

TRANSCRIPT FILED OCTOBER 4, 1890.

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1 (Record, pp. 6 to 20, incl.)

* * * * * * *

STATE OF COLORADO, } ss:
County of Lake, }

In the District Court in and for said County.

WILLIAM P. LINN and LEWIS C. ROCKWELL, Plaintiffs, }
vs. } Complaint.
HUGH BUTLER and CHARLES W. WRIGHT, Defendants. }

The plaintiffs, for a cause of action against defendants, allege:

I.

That on the 24th day of May, A. D. 1879, the plaintiff William P. Linn was the owner of and in possession of an equal undivided one-fourth (¼) interest in and to the American mine, lode, ledge, or deposit, situate in California mining district, Lake county, Colorado, and described as follows, to wit: Being 1,500 feet in length and 250 feet wide, 880 feet S. 3° 31′ east and 620 feet north 3° 31′
2 west of discovery shaft, beginning at cor. No. 1, from whence dis. shaft bears S. 4° 34′ W. 889.04 feet; thence N. 86° 29′ E. 250 ft. to cor. No. 2, a pine post set in mound of stones; thence N. 30° 31′ W. 750 ft. to center stake, 1,500 ft. to cor. No. 3, a pine post; thence S. 86° 29′ W. 250 ft. to cor. No. 4, a pine post in mound of stones, from whence a dead pine 24 inches in diameter bears N. 8° 5′ west 62 ft. to a dead pine 28 inch- in dia., which bears N. 21° 22′ E. 95 ft., and peak of Homestake Mt. bears north 64° 27′ W.; thence S. 3° 31′ east 750 ft. to center stake, 1,500 ft. to cor. No. 1, place of beginning, and being bounded upon the westerly side by the "Tip-top" lode and upon the easterly side by the "Robert E. Lee" lode.

That upon the day and year last aforesaid said Linn sold his right, title, and interest in and to said American mine to the defendants for the sum of five thousand seven hundred and fifty ($5,750.00) dollars, which sale was evidenced by the following agreement in writing in words and figures following, and is made a part of this complaint, to wit:

This agreement, in duplicate, made and entered into this
3 twenty-fourth day of May, A. D. 1879, by and between W. P. Linn, party of the first part, and Hugh Butler and C. W. Wright, parties of the second part:

Whereas, on the day of the date hereof, said second parties purchased of and from said Linn his right and title in and to the American mine for the sum of five thousand seven hundred and fifty ($5,750.00) dollars, payable in instalments—that is to say:

Two hundred and fifty ($250.00) dollars, which has already been paid, receipt whereof is hereby confessed.

Two hundred and fifty ($250.00) dollars in thirty (30) days next after the date hereof.

Two hundred and fifty ($250.00) dollars in sixty (60) days next after the date hereof.

And the remaining five thousand ($5,000.00) dollars out of the net proceeds of said mine, as hereinafter specified.

Whereas, in pursuance of said agreement, said Linn hath on this day, in due form, conveyed unto said second parties said interest in said mine:

4 Now, therefore, this agreement witnesseth: That for and in consideration of the premises it is mutually agreed by and between said parties that this agreement shall not be assignable or negotiable, and that the sums of money herein agreed to be paid shall be due and payable to the said Linn and only to him and to none other.

And it is further agreed on the part of said second parties that they will at the end of thirty (30) days next after the date hereof pay unto said Linn said sum of two hundred and fifty ($250.00) dollars, and in thirty (30) days next thereafter a like sum, and that they will also pay unto said Linn the remaining instalment of five thousand ($5,000.00) dollars, it being well understood, however, that said payment of five thousand ($5,000.00) dollars shall only be due and payable upon the terms and conditions herein—that is to say, that said latter sum shall be due and payable only out of the net proceeds received from the sale of ore taken from said American mine by said second parties, such net proceeds aforesaid of the undivided one-fourth interest of said mine, that being the interest conveyed by said Linn to said second parties.

5 And it is hereby further agreed and fully understood that the net proceeds above specified shall be construed only to mean the money received by said second parties from the sale of ores mined and taken from said mine by them on account of said one-fourth interest and left remaining in hand after paying all expenses of such mining, as well also all moneys advanced by said second parties or paid out by them for and on account of said undivided one-fourth interest, including the seven hundred and fifty ($750.00) dollars paid on account of the purchase of said one-fourth interest.

And in case of sale by said second parties of said interest, then and in that event said five thousand dollars shall at once become due and payable.

In witness whereof said parties have hereunto set their hands on this the day and year first hereinabove written.

HUGH BUTLER.
C. W. WRIGHT.
WM. P. LINN.

III.

6 And afterwards and on the fifth (5th) day of April last past said Linn, for a good and valuable consideration, assigned in writing to Charles F. Burrell his right, title, and interest

in and to the foregoing agreement as security for the loan of twenty-seven hundred ($2,700) dollars before th*an* made by said Linn from said Burrell, which assignment was made with the knowlege and consent of said defendants.

And afterwards and on the twenty-ninth (29th) day of October last past said Charles F. Burrell, for a good and valuable consideration, assigned and set over, in writing, all his right, title, and interest in and to said contract to Lewis C. Rockwell, who now holds said contract as collateral security for money theretofore loaned by him to said William P. Linn.

IV.

And the plaintiffs aver that after the said purchase of said Linn's interest in and to said American lode that said defendants proceeded to occupy, possess, and enjoy said interest until Oct. 25th, A. D. 1879.

7 And afterwards and on the twenty-fifth (25th) day of October, A. D. 1879, the said defendants, together with David H. Moffatt, Jr., William H. James, Henry R. Wolcott, Sydney Webster, and James B. Craig, made a certain agreement *inter* parties in words and figures following, to wit, which is made a part of this complaint:

David H. Moffat *et al.*
with
Sydney Webster *et al.* } Agreement.

This agreement made and entered into this 25th day of October, A. D. 1879, by and between David H. Moffat, Jr., William H. James, and Henry R. Wolcott, party of the first part, and Sydney Webster, James B. Craig, and Hugh Butler and Charles W. Wright, party of the second part:

Whereas said first party are the owners of that certain mining claim, lode, ledge, or deposit, the same being named and called "The Little Sliver," and is situated in California mining district, in
the county of Lake and State of Colorado, and is described by
8 metes and bounds in its location certificate duly executed and
recorded in said county;

And whereas said second party are the owners of that certain mining claims, lode, ledge, or deposit, the same being named and called the American, and is situate in said mining district, and is described by metes and bounds in its relocation certificate duly executed and recorded in said county;

And whereas the territory included within the surface lines of said two mines conflicts as to the major portion thereof;

And whereas the said first party hath applied for a United States patent for said The Little Sliver mine, and said second party hath adversed said application and hath instituted suits in pursuance of such adverse;

And whereas it hath been deemed to the best interest of both said partys to adjust and settle their differences and consolidate both of said mining claims into one claim;

Therefore this agreement witnesseth : That for and in con-
9 sideration of the premises said second party hereby agrees to withdraw said adverse and also all opposition to the said application of said first party for said patent and to dismiss said suits, and will also, on the receipt of said patent by said first party in due form, convey unto said first party or to such person or persons as they may direct thirty-nine seventy-seconds ($\frac{39}{72}$) of that part or portion of said American mine that lies without the surface lines of said The. Little Sliver mine and without the surface lines of the Matchless and the Union Emma mines.

And said first party hereby agrees upon the receipt of said patent they will in due form convey unto said second parties or to such person or persons as they may direct thirty-three seventy-seconds ($\frac{33}{72}$) of the entire The Little Sliver mine—that is to say, twenty-four seventy-seconds ($\frac{24}{72}$) to said Webster and Craig and nine seventy-seconds ($\frac{9}{72}$) to said Butler and Wright.

And it is hereby further understood and agreed that said first party shall pay one-half of the expense of any and all liti-
10 gation that may be had on account of said consolidated mines, and that said second party shall pay the remaining one-half of said expenses accruing after the date hereof.

And it is hereby further agreed that said consolidated mines shall be worked in good and workman-like manner and without unnecessary expense, and that the expense thereof shall be borne and paid by said parties hereto in the proportion of their respective interests as aforesaid, and the net product thereof shall be at the end of each and every month divided between said parties hereto in like proportion; that in the working of said consolidated mine- true, full, accurate, and correct books of account shall be kept, wherein shall be entered and set down all monies paid, laid out, and expended on account of said consolidated mines, as well also all monies received from each, all, and every source whatsoever on account thereof; which said books of account shall at all times during business hours be open to examination and inspection by any of the parties hereto without let or hindrance, as well also the representatives of either of the parties hereto *only* authorized, and that each of the parties hereto shall at all times have the right to explore and inspect the workings of said consolidated mines, as well also all shafts, drifts, and tunnel*ls* therein or which may hereafter be made, as well
11 also the representatives of either of the parties hereto *only* authorized.

And it is hereby further agreed that said consolidated mines shall be worked in a good, workman-like, and frugal and economical manner; that said work shall begin upon the execution hereof, due regard being had to the time necessary to get ready for the same, and shall be prosecuted with due diligence, and that the management thereof shall be devolved upon a general manager, to be selected by the parties hereto, and in making said selection said parties shall each have the right to vote in proportion to his respective interest as herein set forth.

In witness whereof said parties have hereunto set their hands and seals on the day and year first written.

D. H. MOFFAT, Jr.,
H. R. WOLCOTT,
By W. H. JAMES,
Attorney-in-Fact for D. H. Moffat and H. R. Wolcott.
W. H. JAMES,
SIDNEY WEBSTER,
JAMES B. CRAIG,
HUGH BUTLER,
By C. W. WRIGHT, *Att'y.*
C. W. WRIGHT.

Duly acknowledged as to W. H. James, att'y-in-fact for D. H. Moffat & H. R. Wolcott, Nov. 4th, 1879, and recorded in Book 23, page 350.

12 V.

The plaintiffs further aver that the adverse claims spoken of and referred to in the last above named agreement were by the said defendants withdrawn or were withdrawn by their knowledge and consent, and the suits pending in court in support of said adverse claims have by said defendants been dismissed or dismissed with their knowledge and consent, and the application for patent referred to in said last-named agreement has been perfected and a patent has been issued and delivered by the Government of the United States to said Moffat, Wolcott, and James upon the said Little Sliver lode, mine, and premises in pursuance thereof, which patent describes the said Little Sliver lode, mine, and premises as containing $6\frac{57}{100}$ acres, more or less, and being mineral entry 234 and survey lot No. 421, in township 9 south of range 80 west of 6th principal meridian, which patent is recorded in the office of the clerk and recorder of Lake county, Colorado, in Book One (1) of Patents, at page (6), to which reference is hereby made for more minute and particular description of the premises patented.

And that afterwards and upon the first day of September, A. D. 1880, said David H. Moffatt, Jr., Henry R. Wolcott, and William H. James, the grantees in said patent, in pursuance of the 13 agreement above set forth, dated the 25th day of October, A. D. 1879, conveyed an equal undivided nine seventy-seconds $(\frac{9}{72})$ of the said Little Sliver lode, mine, and premises as patented to them to said defendants, which conveyance is recorded in Book 45, page 117, in the office of the clerk and recorder of deeds in and for Lake county, Colorado, and reference therto is hereby made for a more particular description of the premises conveyed.

That so much of the premises patented to said Moffatt, Wolcott and James as the Little Sliver as *as* were carved out of and cover the premises as originally located as the American lode, mine, and premises as first above described in this complaint are identical, and are the same lode, mine, and premises as were originally located as the American lode, mine, and premises as first above described in this complaint and not other or different premises.

And that defendants knowingly and designedly suffered, permitted, and aided the said Moffatt, Wolcott, and James to procure and receive said patent of the said American lode, mine, and premises, under the name and title of the Little Sliver lode, mine, and premises, or so much of said American lode thereof as is covered by said patent for said Little Sliver lode.

14 And that said defendants' title to the undivided nine seventy-seconds ($\frac{9}{72}$) of said Little Sliver is but the undivided $\frac{9}{72}$ of the said American lode, mine, and premises patented under the name of the Little Sliver.

VI.

Plaintiffs further represent and show that ever since the 25th day of October, A. D. 1879, the consolidated properties, as mentioned in said last-named agreement, have been worked by said Moffatt, James, Wolcott, Webster, and Craig, and said Butler and Wright on their joint account, as provided in said agreement of that date, and is now being so worked by the said last-named parties.

Plaintiffs further charge that by reason of said consolidation of the said American with the said Little Sliver lode and mine into one claim it cannot be learned or ascertained by plaintiffs or defendants what amount of ore has been or is being taken out of said American lode since the purchase thereof by said defendants from the said plaintiff, Linn. Neither can it be learned or ascertained what amount of ore is the one-quarter which has been or is being taken from said American lode by the parties working the same, as above stated. Neither can it be learned or ascertained what amount of money has been or is being taken out of said American lode by the above-named parties or any or either of them. Neither can it be 15 learned or ascertained how much ore has been or is being taken out and sold by the parties working said American lode. Neither can it be learned or ascertained how much or what is the amount of the improvements which have been or are being placed on said American lode by defendants or by the parties working the same.

And by this act of consolidating the said American and Little Sliver lodes into one claim defendants have put the management and control, as regards the working of said American lode and mine, beyond their power or control, and have made and rendered it impossible for them to carry out or perform the terms, covenants, and conditions of defendants' said contract with said Linn regarding the payment of the purchase-money of said American lode, as provided in said agreement, and by reason of the premises the plaintiffs charge that the said sum of five thousand dollars has been and is still due and payable from said defendants to said plaintiffs ever since the 25th day of October, A. D. 1879, together with the interest thereon from that date, at the rate of ten (10) per cent. a year.

That defendants have not paid any part or portion of said five thousand dollars to the plaintiff- or to either of them, but that the

same remains due and unpaid, together with the interest
16 thereon since the 25th day of October, A. D. 1879, at the rate
of ten (10) per cent. per year.

VII.

And plaintiffs further represent and show that by reason of the impossibility of the defendants carrying out and performing their contract with said Linn on account of the consolidation of said American and Little Sliver lodes, mines, and premises, as above stated, they are entitled to have and maintain a vendor's lien upon the nine seventy-seconds ($\frac{9}{72}$) of the said Little Sliver lode, mine, and premises, as above described, which is the same and identical premises, lode, and mine, so far as the ground, mine, and premises was patented to said Moffatt, Wolcott and James, under the name of the Little Sliver lode and mine, as is carved out of and covers the ground, lode, mine, and premises sold and conveyed by said Linn to said defendants as the American lode, mine, and premises.

And the plaintiffs are also entitled to have and hold a vendors' lien upon the equal and undivided one-quarter ($\frac{1}{4}$), less an undivided one thirty-second ($\frac{1}{32}$) thereof, of all that portion of said American lode, mine, and premises as lies outside of and beyond the exterior
lines of said Little Sliver lode as patented to said Moffatt,
17 Wolcott, and James for the sum of five thousand dollars, to-
gether with interest thereon since the 25th day of October, at
the rate of ten (10) per cent. per year.

VIII.

Plaintiffs further represent and show that the records of Lake county show that said defendants still own the said undivided nine seventy-seconds ($\frac{9}{72}$) of the said Little Sliver lode as patented to said Moffat, James, and Wolcott, and also the undivided one-quarter ($\frac{1}{4}$), less the undivided one thirty-second ($\frac{1}{32}$) thereof, of all that portion of the American lode, mine, and premises as lies outside of said Little Sliver lode as patented as aforesaid.

Wherefore plaintiffs demand judgment against defendants for the sum of five thousand ($5,000) dollars, together with interest thereon since the 25th day of October, A. D. 1879.

II. That plaintiffs be decreed to have a vendor's lien upon the defendants' interest in the premises above described for the amount of five thousand ($5,000) dollars, together with interest thereon from the 25th day of October, A. D. 1879, until the rendition of judgment herein, and, in case said judgment is not paid, that plain-
tiffs may sell such interest of defendants in said property to
18 pay the same, according to the rule and practice of this
court.

III. For their costs of suit.

LEWIS C. ROCKWELL,
Att'y for Wm. P. Linn and pro se.

STATE OF COLORADO, } ss:
County of Arapahoe,

Lewis C. Rockwell, of lawful age, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, and that this verification is made for himself and on behalf of his coplaintiff herein, William P. Linn.

LEWIS C. ROCKWELL.

Subscribed and sworn to before me by the said Lewis C. Rockwell this 30th day of December, A. D. 1880.

PERCY AUSTIN,
Notary Public.

The said complaint was and is endorsed as hereon appears:
19 No. 1573. In the district court, Lake county. Wm. P. Linn *et al. vs.* Hugh Butler *et al.* Complaint. Filed December 31st, 1880. Chas. W. Taylor, clerk. *S. C.* Rockwell, att'y for pl't'ffs.

20 (Record, pp. 61 to 77, incl.)

* * * * * * *

STATE OF COLORADO, } ss:
County of Lake,

In the District Court in and for the County of Lake Aforesaid.

NATHAN S. HURD and DAVID A. GAGE, Executors of the Last Will and Testament of William P. Linn, Deceased, Plaintiffs, Impleaded with LEWIS C. ROCKWELL, Surviving Plaintiff, Plaintiff,

vs.

HUGH BUTLER and CHARLES W. WRIGHT, Defendants.

Answer of the Defendants to Plaintiffs' Complaint.

The said defendants, answering the said complaint, say:

I.

They deny that William P. Linn was, on the 24th day of May, A. D. 1879, or at any other time, the owner of or in the
21 possession *on* an undivided one-fourth interest in and to the said American mine. They admit that on said day defendants entered into an agreement with said Linn, which is set out at large in the second clause of said complaint.

II.

They deny that said contract was assigned to the said Charles F. Burrill with the knowledge and consent of said defendants, and they deny that they ever assented to the assignment of said contract, either to the said Burrill or to the said Rockwell.

III.

And defendants aver that at and before the making of said contract of purchase set forth in said complaint as aforesaid to and with the said Linn he, the said Linn, with intent to deceive the said defendants, represented to them, at the city of Denver, in the State of Colorado, where said contract was entered into, that there was a valid and subsisting mining claim and location known as and called the American mine, situate in California mining district, in the county of Lake and State of Colorado, and that he was the owner of the undivided one-fourth part thereof; that the discovery shaft on said American mine had been sunk down from the surface
on said claim to mineral in place and at a depth then more
22 than ten feet below the surface, and that in the bottom of
said discovery shaft mineral-bearing rock of value, for silver, had had been found, and that the said claim had been duly located, staked, and recorded in accordance with law, and that by reason of the several acts performed by the said Linn and his co-owners in said location they had become entitled to own and did then in fact own said mining claim and location in accordance with the rules and customs in said California mining district, in Lake county, Colorado, and in accordance with the laws of the State of Colorado and of the United States; and that he, the said Linn, was the legal and proper owner of the undivided one-fourth part thereof, and as such owner was fully empowered to bargain, sell, and convey the same to these defendants; that these defendants, relying upon the representations so made by the said Linn as aforesaid, and believing the same to be true, purchased said supposed interest as aforesaid, and made and entered into said contract on the 24th day of May, A. D. 1879, which is the same contract set forth in the said plaintiffs' complaint, and that at the time of the making and entering into of said contract they had no personal or other knowledge of and concerning
the said American mine and location save the information to
23 them given by the said Linn; and they aver that the said
representations and each of them, except as to the depth of the discovery shaft on said claim, were false and fraudulent, and were made with the intent to mislead, misinform, and deceive and defraud the said defendants, and to induce them to make and enter into said contract of purchase, and that the said defendants, by means of the said false representations, were in fact deceived by the said Linn and were induced to and did enter into said contract by means of said false and fraudulent representations as aforesaid.

IV.

Defendants further aver that thereafter David H. Moffat, Jr., William H. James, and Henry R. Wolcott began to sink a shaft on a small strip of vacant and unoccupied ground, the same being a part of the public mineral domain of the United States, immediately adjacent to said American mine and location; that they sunk said

shaft to a sufficient depth to penetrate the contract matter lying beneath the surface thereof, and discovered and disclosed in the bottom of said shaft and in said contract matter a vein or lode con-
24 taining mineral-bearing rock of value for silver in place, and
that the said vein was discovered and disclosed in said shaft before the same was found on — under the said American mine or location or any part thereof; and that the said vein or deposit so found in the said shaft sunk by the said Moffatt, Wolcott, and others was the identical vein alleged and supposed to exist in the said American mine and location, and was the identical vein which the said Linn claimed and represented had been discovered in the said so-called discovery shaft of the American lode and location, and the one which the said Linn pretended and attempted to convey to these defendants.

V.

Defendants further aver that as soon as they were advised and informed that the said vein had been found by the said Moffatt and others in their said shaft they informed the said Linn of the facts hereinbefore stated; that he thereupon asserted and represented that the shaft sunk on the said American mine did uncover and had uncovered and disclosed in the bottom thereof mineral-bearing rock in place, and that the same was discovered and duly located in said American mine before the said shaft sunk by the said
25 Moffatt and others had been commenced, and advised defend-
ants to contest the right and title of the said Moffatt and others to their said supposed discovery in their said shaft.

VI.

They further aver that afterwards, to wit, on or about the — day of ——, the said Moffatt and others, having sunk their discovery shaft to a depth of ten feet or more below the surface, and having found therein, as they claimed, a well-defined vein or lode containing silver-bearing rock of great value, and having duly staked and located their claim upon the surface, and having made and caused to be filed in the recorder's office of Lake county, Colorado, their certificate of location, designating the claim as The Little Sliver Lode mining claim, claiming to be the owners thereof, and as such owners did make, at the proper land office of the United States in and for the district of which the said county of Lake was a part, an application for patent for the said Little Sliver lode and mining location, the said application for patent embracing in its area an amount of ground and surface and all the mineral matter
26 therein aggregating —— acres or more, and that the ground
and area covered by and contained in said application, including and embracing a large part of the so-called American lode, to wit, —— acres or more, and that part of the same included the so-called discovery shaft of the said American lode or location.

VII.

Said defendants further aver that afterwards and while the said

application for patent so made by the said Moffatt and others as aforesaid for said Little Sliver lode or location was pending the said Linn repeated his statements and representations that a lode or vein in place had been duly found and discovered in said American mine or location and urged and advised defendants and the other owners of said American mine or location to make and cause to be filed in the proper land office an adverse claim against said application for patent, as by laws provided; and these defendants aver that in accordance with the said advice and at the request of the said Linn they did join the other owners of said American mining claim and did make and file an adverse claim against said application in the
said land office, and the said defendants, together with the
27 other owners of said American lode, did, within 30 days
thereafter, cause to be instituted a suit in the district court of the county of Lake, in the State of Colorado, in support of said adverse claim.

VIII.

Defendants aver that afterwards and while the said adverse claim and suit were pending they commenced to make preparations for the trial of said suit and to gather and collect testimony in support of said adverse claim and the suit commenced in aid thereof, and that after due and diligent inquiry they learned and ascertained that the representations made by the said Linn as aforesaid, that mineral had been found and discovered in place in said American location, were untrue, false, and fraudulent; and they further learned, as the result of said inquiries and investigations, that mineral-bearing rock in place, valuable for silver, had been found and discovered in the said discovery shaft of the said Little Sliver lode and location, and they then learned and ascertained that the said location of the said American Lode mining claim had been made
and the location certificate thereof recorded before a mineral
28 lode, vein, or deposit in place had been found, disclosed, or
discovered within the limits of said claim, and that for said reasons the said location was invalid and of no force or effect whatever.

IX.

Defendants further aver that after learning from the inquiries and examination aforesaid the facts just hereinbefore stated they informed the said Linn of the same and expressed to him their fear that they would be defeated in the maintenance of their said adverse claim and would be defeated in their said suit which they had instituted in support thereof, and that thereupon the said Linn advised these defendants to join the other owners of said American location in an effort to effect some kind of a settlement, adjustment, or compromise with the owners of said Little Sliver lode and location, and the said Linn, for the purpose of inducing said defendants to make some adjustment, settlement, or compromise with said Moffatt, Wolcott, and others concerning said supposed American mining claim or location, stated to and agreed with defendants that any settlement, adjust-, or compromise which they could or might

make concerning said claim would be satisfactory to him,
29 and that in case of any such settlement he would change and
modify the said agreement made and entered into by and
between him and said defendants on the 24th day of May, A. D.
1879, as aforesaid, and that he would, so far as such settlement might
require, relieve said defendants from the expressed term- and conditions
of said agreement, and agreed that after the making of any
such settlement he would modify said agreement accordingly; that
thereafter and in pursuance of the said statement, agreement, and
request of the said Linn and at his solicitation and request these defendants,
together with the other owners of the said American
mining location, did negotiate with and effect a settlement and adjustment
with said owners, whereby it was agreed that the said adverse
claim and the said suit thereof should be withdrawn by the
other owners of the said American mining claim and these defendants,
and that a patent should be allowed to issue to the said owners
of the Little Sliver mining claim without objection on the part of the
other owners of the said American location and of these defendants,
and that when a patent was so obtained the said said owners of the
Little Sliver mining claim should convey to the other owners
30 of the said American mining claim a certain proportion of
said premises and to these defendants the undivided one-eight-part
thereof; that by the terms of said settlement these defendants
relinquished their claim to one-half of their alleged interest in and
to the property in controversy and received in exchange therefor a
clear, perfect, and indubitable title to said property by patent from
the United States for the undivided one-eight- part thereof.

X.

These defendants further aver that, immediately after making
said settlement and adjustment as aforesaid, they informed the said
Linn of the said settlement and all the conditions and details thereof,
and the said Linn fully assented to and ratified and confirmed the
same; and, in consideration of said settlement, it was then and there
agreed by and between the said Linn and these defendants that the
said contract set forth in the said complaint should be so modified
that the remaining interest owned and held by said defendants in
said property should be held under said agreement in lieu of the
original undivided one-fourth part of the said supposed
31 mining location, and that the said undivided one-eight- part
of the said Little Sliver lode acquired by and vested and
confirmed in said defendants as aforesaid should be deemed and
considered to be the property in lieu of the said supposed one-fourth
of the American mine from which the said sum of five thousand
($5,000) dollars should be realized by said defendants and paid to
said Linn, and that when, and not before, the said defendants should
realize and receive from the net proceeds received from the sale of
ore taken from said Little Sliver mine, such net proceeds to be the
net proceeds aforesaid of the said undivided one-eight- part of the
said Little Sliver mine after deducting all expenses of mining and
all sums of money advanced by said defendants in connection with

said purchase, including said sum of $750 and all other sums paid by said defendants in litigating, maintaining, and defending their claim to said property and in negotiating and settling said controversy, and that all the other terms and conditions of said agreement should remain in full force and effect and in no manner changed or modified; and it was further agreed that the said settlement and adjustment of the controversy between said defendants
32 and the owners of the said American Lode mining claim
should not be regarded as in any sense a sale, conveyance, or disposition of the said property within the meaning of said contract of May 24th, A. D. 1879, and that defendants should not be liable for the payment of the said sum of $5,000 or any part thereof by reason of the said agreement with the said Moffatt *et al.* as aforesaid, and that they should not be liable for the payment of said sum or any part thereof, except from the net proceeds of the ore taken from the said undivided one-eight- of the said Little Sliver lode or from the sale and conveyance thereof.

XI.

And said defendants further aver that but for said settlement and adjustment they would have been unable to keep or retain any interest in said property, and that the same would have been wholly lost to said defendants and the said Linn would have lost his right to recover and obtain the sums of money mentioned in said contract in said complaint set forth.

XII.

33 And said defendants further deny that they unlawfully or
designedly suffered, permitted, or aided the said Moffat, Wolcott, and others or either of them to procure or receive a patent to the said American Lode mining claim or premises under the name of the Little Sliver mine or location or any -- thereof except as hereinbefore stated; and they deny that by reason of said settlement and consolidation or for any other reasons it could not or cannot be learned by plaintiff what amount of ore has been or what amount of ore is being taken out of said mine at any time since said alleged purchase thereof by defendants from said Linn; and they further deny that it cannot be learned or ascertained what amount of ore comes from the interest owned by these defendants in said property by the parties working the same; and they further deny that it cannot be learned or ascertained how much ore has been and is being taken out and sold by the parties working the said mine; and they deny that it cannot be learned and ascertained how much or what are the improvements that have been made or are being placed on said mine by defendants and by the parties
34 working the same; but, on the contrary they aver that all the
information required or to be given under and by virtue of said contract has always been accessable and available to the said Linn or his duly accredited representatives; that no information of that kind has ever been applied for and never has been refused or denied

by these defendants or either of them or by any person working, operating, or managing said property; and they aver that they are and at all times have been ready and willing to give any and all information required under and by virtue of said contract.

XIII.

And defendants further deny that by reason of said act of consolidation or because other persons have become interested in the ownership and management of said property that they are unable to control the working of said property; but they aver that they never had the power to exclusively own, manage, or control said property or any part thereof; that their interest in said property has always been undivided in character and inferior in quantity, and that the right to participate in the control and manage-
35 ment and working of said property has always existed and still exists in the same way as before in company with the other owners of said property; and they deny that it was or is impossible for them to comply with the terms, covenants, and conditions of said agreement; but, on the contrary, they aver that they are still able and willing to carry out, observe, and perform all the terms and conditions of said agreement as modified by the supplemental agreement, hereinbefore mentioned, thereafter made between them and the said Linn.

XIV.

Said defendants further aver that it was stipulated by and between the said Linn and these defendants in said original contract as well — in said supplemental contract assenting to the settlement, adjustment, and compromise as aforesaid that all the rights, benefits, and privileges of the said Linn and the right to demand and receive any and all moneys that might come to him under said contract should not be assignable, and that the same should be payable to the said Linn only, and that the same was a joint and not a several contract on the part of these defendants; and they aver
36 that they have never agreed or consented to any assignment of said contract or any part thereof or any interest therein either to the said Burrill or to the said Rockwell; and they deny that the said Rockwell is now the owner of said contract or any part thereof or any interest therein; and they deny his right to maintain this suit against them.

XV.

And defendants further aver, upon information and belief, that the supposed assignment of said contract to said plaintiff was only for the purpose of securing the payment to said Rockwell of certain debts and claims held by said Rockwell against said Linn; and they further aver, upon information and belief, that the said debts and claims have been fully paid and satisfied.

XVI.

And the said defendants, for further answer, allege that all the

acts and doings of said defendants described and complained of in said complaint occurred and all the supposed causes of action in
said complaint mentioned and set forth therein accrued more
37 than six years before the said plaintiffs, Nathan S. Hurd and
David A. Gage, executors as aforesaid, instituted this suit against said defendants, and that the same was barred by the statutes of this State in such case made and provided.

XVII.

And defendants, for a further answer, aver that William P. Linn, the testator of the said plaintiffs, Hurd and Gage, departed this life on or about the 5th day of Feb., A. D. 1885; that before the decease of the said Linn a writ of error had been sued out of the supreme court of the State of Colorado, in a cause wherein said William P. Linn and Lewis C. Rockwell were plaintiffs and these defendants were defendants, to review the records and proceedings and judgment in said cause had, done, and rendered in the district court of the county of Lake, in said State of Colorado, and that at the time of the decease of said Linn the said writ of error was pending and undetermined in the supreme court of said State; that while the same remained in said supreme court no application was made by the plaintiffs Hurd and Gage or either of them to become parties thereto
in the place and stead of or as the successors and representa-
38 tives of the said William P. Linn; that thereafter said writ
of error was prosecuted to final judgment in said supreme court, and said supreme court ordered and adjudged that the judgment theretofore rendered in said cause by the district court of the county of Lake aforesaid be reversed and said cause be remanded to said court for further proceedings according to law; that thereafter Lewis C. Rockwell, with the knowledge and consent of the said Hurd and Gage, made a motion in said cause to the effect that he be permitted to prosecute the same as surviving plaintiff, and that afterwards, to wit, on the — day of ——, A. D. ——, said motion was sustained by the said district court of Lake county; and thereupon the said Rockwell was permitted to become and did become the sole surviving plaintiff in said suit, and by the order of said court was permitted and authorized to prosecute the same as the sole and surviving plaintiff; and defendants aver that by reason of the acts before mentioned and of the conduct of the said plaintiffs, Hurd and Gage, the said suit became and was discontinued as to them, and
that they have no right now to prosecute and maintain the
39 same against these defendants.

And defendants aver that they are barred from so prosecuting and maintaining this suit by the judgment of the said district court of Lake county on the aforesaid motion made by the said Rockwell.

Wherefore defendants demand judgment that they go hence without day, that this suit be dismissed, and that they have judgment for their costs in this behalf expended.

HUGH BUTLER,
Att'y for Defendants.

STATE OF NEBRASKA, } ss:
County of —, }

Charles W. Wright, one of the above-named defendants, being first duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof; that the same is true in substance and in fact except as to those matters which are stated upon information and belief, and as to such matters he believes the same to be true.

40 Affiant further states that he was the one by whom the contract sued on in this case was made, as well for himself as for his codefendant, the said Hugh Butler, and that he also was the one who made the supplemental contract in said answer mentioned, and that he had charge of and conducted and managed all the transactions and negotiations growing out of said contract and is more familiar with the facts of this case than his said codefendant, Butler, and that he makes this verification for and on behalf of the said Butler as well as himself.

CHARLES W. WRIGHT.

Subscribed and sworn to before me this 24th day of February, A. D. 1887.

[SEAL.] JESSE C. BELL,
Notary Public.

Which said answers was and is indorsed as hereon appears:

41 District court of Lake county. S. C. Rockwell, etc., plaintiff, *vs.* Hugh Butler and Charles W. Wright. Defendants' answer to complaint. Hugh Butler, att'y for def'ts.

42 (Record, pp. 90 to 103, incl.)

* * * * * * *

STATE OF COLORADO, } ss:
County of Lake, }

In the District Court within and for said Lake County.

LEWIS C. ROCKWELL and NATHAN S. HURD and DAVID A. GAGE, Executors of the Last Will and Testament of William P. Linn, Deceased, Plaintiffs,
vs.
HUGH BUTLER and CHARLES W. WRIGHT, Defendants.

Now come said plaintiffs and for replication to the third paragraph of the answer of said defendants, filed herein, upon information and belief say it is not true and they deny that at or before the making of said contract of purchase set forth in said complaint, or at any other time, the said Linn in his lifetime made any representations to defendants with intent to deceive, injure, or mislead defendants in relation to said contract with reference to there being a valid

subsisting mining claim and location called the American
43 mine, situate in California mining district, Lake county, Col-
orado, and that the discovery shaft of said mine had been
sunk to mineral in place, and that in the bottom of said discovery
shaft there was mineral-bearing rock of value for silver, and that
said claim had been duly located, staked, and recorded in accordadce
with law, and that said Linn, together with his co-owners, by
virtue of said discovery and location, had become entitled to own or
did own said American mining claim in accordance with the rules
and customs of said California mining district or otherwise, or in
accordance with the laws of the State of Colorado or of the United
States; deny that these defendants or either of them relied upon
any representations so made by said Linn or believed the same
true; purchased Linn's interest in said American mine or entered
into said contract dated the 24th day of May, 1879; deny that at
the time of making said contract defendants did not have personal
knowledge as to the discovery of mineral in said mine and the sinking
of said discovery shaft and what the same showed with reference
to a lode therein; deny they were not fully informed as to the
location of said lode, but aver the contrary thereof to be the
44 truth; deny that any representations said Linn made, as hereinbefore
set forth, was or were untrue, false, or fraudulent, or
made with intent to mislead, misinform, or deceive said defendants
or either of them; deny that said defendants or either of them were
or was thereby mislead, misinformed, or deceived; deny that they
or either of them was or were thereby induced to sign or enter into
said contract by means of any representations which said Linn then
and there made to them.

And these plaintiffs, replying to the fourth paragraph of said
answer, say that whether or not David H. Moffat, Junior, William
H. James, and Henry R. Wolcott or either of them ever sunk a shaft
upon vacant and unoccupied ground of the public mineral domain
of the United States adjacent to the American mine and location
these plaintiffs have not and cannot obtain sufficient knowledge or
information upon which to base a belief, or whether or not any
mineral-bearing vein was struck and found in any shaft or workings
of said Moffat, James, and Wolcott, or whether or not said shaft
thus found and disclosed was the same and identical mineral vein
as the one in the American mine or location or represented to
45 have existed by the said Linn in said discovery shaft of said
American lode or location these plaintiffs have not and cannot
obtain sufficient knowledge or information upon which to base
a belief.

These plaintiffs, replying to the fifth paragraph of defendants'
said answer, upon information and belief deny that defendants or
either of them at any time notified said Linn that said Moffat, Wolcott,
and others had been sinking a shaft adjacent to the American
mine; deny that said Linn advised the said defendants or either of
them to contest the right or title of said Moffat and others to their
supposed discovery in their said shaft; deny that said Linn then and
there or at any time represented to said defendants that a mineral-

bearing vein was found, discovered, and disclosed in the discovery shaft of said American lode.

These plaintiffs, replying to the sixth paragraph of said answer,
say that whether or not Moffat, James, and Wolcott ever sunk a dis-
covery shaft to a depth of ten feet or more below the surface, or
whether they found therein a well-defined lode containing silver-
bearing rock, and whether or not they staked and located their claim
upon the surface or caused a location certificate thereof to
46 be filed in the office of the clerk and recorder in and for Lake
county, Colorado, designating such claim as the Little Sliver
Lode mining claim these plaintiffs have not and cannot obtain suffi-
cient knowledge or information upon which to base a belief.

These plaintiffs, replying to the 7th paragraph of said answer,
upon information and belief deny that said Linn, either while the
application for patent made by said Moffat and others upon said
Little Sliver lode was pending or at any other time, repeated any
statement or made any representations that a lode or vein in place
had been found or discovered in said American mine or location,
or urged or advised defendants or either of them, as the owners
of said American mine or location, to make or cause to be filed in
the proper land office an adverse claim against said application for
patent, and deny that said defendants, with the advice or at the
request of said Linn, made or joined the other owners of said
American mining claim in filing any adverse claim against said
Moffat, James, and Wolcott's application for patent for said Little
Sliver lode; and plaintiffs aver that if any adverse — was filed by
the said defendants it was upon their own account and for
47 their own use and benefit, and that said Linn had nothing
whatsoever to do with the same; that he neither advised
nor countenanced the bringing of said adverse claim nor was inter-
ested in that contest; that whether or not any suit was brought by
defendants or any other owners of said American mine to make
good any adverse claim filed by them these plaintiffs have not and
cannot obtain sufficient knowledge or information upon which to
base a belief.

These plaintiffs, replying to the 8th paragraph of said answer,
upon information and belief deny that said defendants ever learned
or ascertained that any representations made by said Linn as to the
existence of mineral in the discovery shaft of said American lode
were untrue, false, or fraudulent; deny that they ever learned that
any mineral had been found or discovered in the discovery shaft of
said Little Sliver lode or location; deny that they learned or ascer-
tained that the location of said American mine had been made before
mineral had been found in said discovery shaft, or elsewhere dis-
closed or discovered within the limits of said American mining
claim; deny that they found that said location of said American lode
was invalid or of no force or effect whatever.

48 These plaintiffs, replying to the 9th paragraph of said an-
swer, upon like information and belief deny that said defend-
ants or either of them ever stated to said Linn or expressed to him
their fears that they would be defeated in the maintenance of their

adverse claim or that they would be defeated in their suit which they had instituted in support thereof; deny said Linn advised such defendants to join with other owners of said American location in the efforts to effect any kind of a settlement of that dispute or compromise that controversy, and deny that said Linn, for the purpose of inducing defendants to make any adjustment, settlement, or compromise with Moffat, Wolcott, and others concerning the said contest and dispute between said supposed Little Sliver lode and the said American mining claim, stated or agreed with defendants that any settlement, adjustment, or compromise which they could or might make concerning said claim would be satisfactory to him, and deny that said Linn stated that any such settlement, adjustment, or compromise which defendants might or could make concerning said dispute would be satisfactory to him; deny said Linn agreed with defendants or either of them that by reason of any 49 settlement, adjustment, or compromise which they might make with said Moffat, Wolcott, and others concerning the supposed conflict between said Little Sliver and American lodes that he, Linn would change or modify said agreement entered into between himself, of the one side, and defendants, of the other side, dated the 24th day of May, 1879; deny said Linn ever agreed to relieve defendants from the terms, covenants, and conditions of said agreement; deny that said Linn ever agreed to modify said agreement in any respect whatsoever, and deny that in pursuance of any supposed conversation, contract, or agreement had between said Linn and said defendants or with said Linn's knowledge or at his instance or request did said defendants make or enter into any agreement, contract, or understanding with said Moffat, Wolcott, and others, on the one side, and themselves, of the other side, of or concerning said supposed conflict between said American and said Little Sliver lodes, whereby or in pursuance of which the adverse — filed by defendants against Moffat, Wolcott, and others' application for patent on the Little Sliver lode, whereby or in pursuance of which the adverse — filed by defendants against Moffat, Wolcott, and others' application for patent on the Little Sliver lode should be or was withdrawn, or that patent 50 should be allowed to issue to the owners of said Little Sliver claim without objection on the part of the owners of said American lode, and that when a patent was issued to the owners of the said Little Sliver mining claim they should convey to the owners of said American mining claim a certain portion of said premises and to these defendants the undivided one-eighth part thereof, or that by reason of any agreement with said Linn and these defendants or with any understanding with him did these defendants reliquish their claim to half of their alleged interest in and to said property in controversy or receive in exchange therefor any interest in said Little Sliver lode.

These plaintiffs, replying to the 10th paragraph of said answer, upon like information and belief deny that said defendants ever informed said Linn of said settlement or the conditions thereof; deny that said Linn ever fully or otherwise consented to or ratified or confirmed the same or any part thereof; deny that in consideration of

such settlement and adjustment of said dispute it was then and there agreed by and between said Linn and these defendants that said contract set forth in said complaint should be so far modified that the remaining interest owned and held by said de-
51 fendant in said property should be held under said agreement in lieu of the original undivided one-fourth part of said supposed mining claim or any other interest therein; deny that the undivided one-eighth part of said Little Sliver lode acquired by or vested or confirmed in defendants should be deemed or considered to be the property in lieu of the said supposed one-fourth of the American mine, from which the sum of $5,000 should be realized by said defendants and paid to said Linn; deny that said Linn then and there or at any time agreed that said $5,000, the purchase price of said American mine, should be paid defendants from the net proceeds received from the sale of ore taken from said Little Sliver mine or taken from the interest which said defendants received in said Little Sliver mine, or that said contract should be satisfied from any such interest in said Little Sliver lode; and deny that any new or other agreement was ever entered into by and between the said Linn, of the one side, and the defendants, of the other side, whereby $750 or any other sum for litigation or expense or any sum of money paid by defendants in litigating, maintaining, and defending their claim to said property or in negotiating the settlement of the controversy between the
52 supposed Little Sliver lode and the American lode should be taken out and deducted from the net proceeds derived from working the interests defendants say they obtained in said Little Sliver lode through said compromise and settlement with said Moffat, Wolcott, and others as the owners of said lode; and deny that there was ever any agreement or understanding between said Linn, of the one side, and said defendants, of the other, that any settlement or adjustment of the controversy between the defendants, of the one side, and said Moffat, Wolcott, and others, of the other side, should not be considered between said Linn and said defendants as any sale, conveyance, or disposition of said property within the meaning of said contract of May 24, 1879, and that defendants should not be liable for the payment of said sum of $5,000 or any part thereof by reason of any supposed agreement with said Moffat, Wolcott, and others, upon the one side, and themselves, upon the other; deny that by reason of any such subsequent agreement said Linn agreed to take his said $5,000 out of the net proceeds of the ore taken from said undivided one-eight- part of said Little Sliver lode.

These plaintiffs, further replying to the 11th paragraph of
53 said answer, deny that they would have been unable to have kept or retained any interest in said American lode, or that the same would have been lost to defendants or to said Linn unless said agreement and settlement was made.

And these plaintiffs, replying to the 12th paragraph of said answer, say it is not true, and they deny that, defendants did not lawfully and designedly suffer, permit, and aid Moffat, Wolcott, and others in procuring and receiving a patent to said Little Sliver Lode mining claim; and plaintiffs deny that any information required or to be gained under and by virtue of said contract was ever at any time accessible or available to the said Linn or to the plaintiffs herein; and deny that said defendants or either of them have ever been ready or willing to furnish any information to said Linn concerning said purchase.

And plaintiffs, replying to the 13th paragraph of said answer, deny that defendants have ever been ready or willing to perform or carry out all or any of the terms, clauses, or conditions of said agreement as modified as defendants claim or as said contract originally and now exists.

54 These plaintiffs, replying to the 14th paragraph of said answer, deny it was ever stipulated or agreed in any supplemental contract made between said Linn and these defendants that the same should not be assignable; admit it was stipulated in said contract that the same should not be assignable; but plaintiffs aver that said defendants did, after the making and delivery of the same, consent and agree to and with said Linn and said Charles F. Burrell that the same might be assigned and delivered by said Linn to said Burrell, and said defendants afterwards and in the month of April, A. D. 1880, agreed and consented with said Linn, Burrell, and said plaintiff, Rockwell, that said contract might be assigned and delivered by said Linn and Burrell to said Rockwell; and said plaintiffs deny that said Rockwell is not now the owner of said contract; deny that he has no interest therein; deny that he has no right to maintain this action, but aver the contrary thereof to be the truth.

Plaintiffs, answering the 15th paragraph of said answer, say it is not true, and they deny, that said Rockwell has been paid the money advanced by him upon said contract, or that said money has been in any way repaid to him.

55 And plaintiffs, further replying to said answer, upon information and belief say that after said contract had been made and delivered by said defendants to said Linn, to wit, on or about the 1st day of April, A. D. 1880, and after the several times and dates mentioned in said answer, on which days and dates it is claimed by defendants said agreement between themselves and said Linn was modified by reason of a compromise made and entered into by and between themselves, upon the one side, and said Moffat, Wolcott, and others, upon the other, one Charles F. Burrell desired to acquire an interest in said contract by loaning said Linn some money and having said contract assigned to him as security therefor, and, for the purpose of ascertaining whether said contract was still of force and effect and binding upon defendants and so considered by them, applied to said defendants, at Denver, in Arapahoe county, in the State of Colorado, and asked said defendants if said contract mentioned and set forth in the complaint, dated the 24th day of May, 1879, was all right and still a subsisting one between themselves, of the one side, and said Linn, of the other, and said Burrell then and there stated to said defendants that he was about
56 to advance money to said Linn and take said contract as security therefor, provided said contract was all right and so

considered and acknowledged by said defendants, and if they would also consent for said Linn to assign and deliver said contract to him, said Burrell, to which inquiry said defendants then and there replied that said contract was all right and binding on them, in no way modified or changed, and that they would and did then and there consent that said Linn should assign and deliver the same to said Charles F. Burrell; and said Burrell, relying upon the representations of said defendants regranting said contract so as aforesaid made to him, then and there advanced to said Linn the sum of $2,800 upon said contract and took as a security therefor an assignment of said contract under the hand of said Linn; and plaintiffs aver that said defendants are estopped from now setting up or claiming that said contract is not binding upon them, and that they are estopped from saying that said contract was before then modified or changed, or that any other contract was ever made in
57 lieu of it.

And plaintiffs further aver that afterwards and on or about the 29th day of May, A. D. 1880, the said Burrell desired to have said Linn repay to him the said sum of some $2,800 which he had previously loaned to Linn and for which he had taken as security therefor an assignment of said contract; whereupon said Linn and Burrell applied to said Rockwell to advance to said Burrell the said $2,800 and for him, Rockwell, to take an assignment of said contract from Burrell as security therefor; whereupon said Rockwell applied to said defendants and stated to them that said Burrell and Linn desired him, Rockwell, to advance and pay to said Burrell the sum of $2,800, the money he had there-fore and in the month of May of that year advanced and paid to said Linn and taken said contract as security therefor, and that he, Rockwell, desired to know if said contract was still a subsisting one between said Linn and said defendants, and if — acknowledged themselves bound thereby, and whether said defendants had any objection to said
58 Rockwell's taking the same from said Burrell; whereupon
said defendants replied, first, that said contract was all right; that the same had never been changed or in anywise modified, and that they had no objection to said Burrell's assigning and delivering said contract to said Rockwell, who, relying upon the representations and statements of said defendants that said contract was still a subsisting one, in nowise modified or changed, between themselves and said Linn, proceeded to and did then and there advance to said Burrell the sum of $2,800 upon said contract, and received as security therefor an assignment of said contract by said Burrell under his hand and the delivery of the same to him, said Rockwell, by said Burrell; that said Rockwell afterwards from time to time and in utter ignorance of the claim by defendants that said contract had been changed and modified advanced to said Linn other moneys to the amount of over five thousand dollars, taking said contract as collateral security for the money so advanced; and plaintiffs
59 aver that said defendants are estopped from setting up, claiming, or maintaining that said contract was not a good and

valid one, and estopped from claiming that the same was ever modified or changed between themselves and said Linn.

Wherefore plaintiffs pray that said defendants take nothing in and by their said plea, and demand judgment as in and by their said complaint they have already prayed.

L. C. ROCKWELL,
Att'y pro se.

CLINTON REED,
Att'y for Executors.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

L. C. Rockwell, of lawful age, being first duly sworn according to law, on oath deposes and says he is one of the plaintiffs in this action; that he has read the above and foregoing replication
60 and knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

Affiant further says this verification is made for himself and on behalf of his co-plaintiffs herein.

LEWIS C. ROCKWELL.

JOS. H. PLAYTER,
Clerk Dist. Court.

Subscribed and sworn to before me this 7th day of March, 1887.

HARRY CARR,
Notary Public.

Which said replication was and is indorsed as hereon appears:

61 No. 1513. In the district court of Lake county. L. C. Rockwell *et al.*, plaintiffs, *vs.* Hugh Butler *et al.*, defendants. Replication. Filed M'ch 8th, 1887. Joseph H. Playter, clerk. L. C. Rockwell and Clinton Reed, att'y- for pl'ffs.

62 (Record, pp. 110 to 112, incl.)

* * * * * * *

December Term, A. D. 1887.

LEWIS C. ROCKWELL *et al.*, Plaintiffs, }
vs. } No. 1513.
HUGH BUTLER *et al.*, Defendants. }

THURSDAY, *December 22nd, A. D.* 1887.

Now, on this day, come the plaintiffs herein, by Lewis C. Rockwell and Clinton Reed, their attorneys, and come the defendants herein in their own proper persons and by Messrs. T. D. W. Yonley and C. C. Parsons, their attorneys.

And thereupon this cause comes on for trial in its regular order, and said defendants file herein their motion to suppress the deposition of Charles Burrell on file in this case, which the court, upon due consideration thereof, now overrules; and to try the issues 63 joined herein comes now the following jury, to wit, B. J. Neill, Sam. P. Davis, Frank Cornforth, Wm. Morrow, G. P. Copeland, Jacob Rupp, D. H. Dougan, J. W. Hoard, J. G. Cooper, L. A. Braham, Fred. O. Parsons, and James Barry, twelve good and lawful men of the county of Lake, who are duly empanneled, tried, and sworn to well and truly try the matters at issue between the plaintiffs and defendants and a true verdict render according to the evidence.

And, the trial not being concluded at the hour of adjournment, the jury are admonished in their duties and excused and allowed to separate until to-morrow morning at ten o'clock.

December Term, A. D. 1887.

Lewis C. Rockwell *et al.*, Plaintiffs,
vs. } No. 1513.
Hugh Butler *et al.*, Defendants.

Friday, *December 23rd, A. D.* 1887.

64 Now, on this day, again come the parties hereto, by their respective attorneys as before, and the jury empanneled herein also come, and the trial of this case is proceeded with.

And, not being concluded at the hour of adjournment, the jury are again admonished in their duties and excused and allowed to separate until to-morrow morning at ten o'clock.

December Term, A. D. 1887.

Lewis C. Rockwell *et al.*, Plaintiffs,
vs. } No. 1513.
Hugh Butler *et al.*, Defendants.

Saturday, *December 24th, A. D.* 1887.

Now, on this day, again come the parties hereto, by their respective attorneys as before, and, the jury being called and all being present, the trial of this case is proceeded with.

65 And the jury, having heard the evidence adduced and the arguments of counsel thereon, and having been instructed by the court in the law governing this case, now retire to their room to consider of their verdict, and after due deliberation return into court and present the following verdict, to wit:

"We, the jury, find the issues for plaintiffs and assess their damages at the sum of 9,008.33 dollars.

D. H. DOUGAN, *Foreman.*"

Thereupon said jury are discharged from the further consideration of this case; and said defendants giving notice that they will file herein their motion for a new trial of this case within ten days from this date, which time is hereby allowed them—

It is ordered that all proceedings under said verdict be stayed until the hearing of said motion.

66 (Record, pp. 117 & 118.)

* * * * * * *

December Term, A. D. 1887.

LEWIS C. ROCKWELL and NATHAN S. HURD and DAVID A. GAGE, Executors of the Last Will and Testament of William P. Linn, Deceased, Plaintiffs,
vs.
HUGH BUTLER and CHARLES W. WRIGHT, Defendants.
} No. 1513.

TUESDAY, *January 17th, A. D.* 1888.

Now, on this 17th day of January, A. D. 1888, this cause comes on for further hearing upon the defendants' motion for a new trial herein, and, same having been submitted to the court and the court being fully advised in the premises, the same is overruled.

Whereupon plaintiffs move the court for judgment upon the verdict; and the jury by whom the issues joined in this case were 67 tried having rendered a verdict therein in favor of the plaintiffs and against the defendants, and having assessed plaintiffs' damages in the premises at the sum of $9,008.33 over and above their costs and charges by them — and about this suit in that behalf expended—

Therefore it is considered and adjudged by the court that the plaintiffs do recover against the defendants, Hugh Butler and Charles W. Wright, their damages by the jurors aforesaid in form as aforesaid assessed for the sum of $9,008.33, together with their costs and charges aforesaid, to be taxed, and that plaintiffs do have execution therefor.

And now again come the defendants, by their attorney, and pray an appeal from the judgment herein to the supreme court of the State of Colorado, which is by the court allowed upon condition that said defendants within sixty days from this date give a good and sufficient appeal bond herein, conditioned according to law, payable to said plaintiffs, in the penal sum of $12,000.00, the said bond 68 to be approved by the clerk of this court; and on motion of defendants it is further ordered that they have sixty days from this date in which to prepare and tender their bill of exceptions herein; and, by agreement of the parties and in pursuance of a stipulation filed in this case, this order is entered now as of the 29th day of December, A. D. 1887.

69 (Record, pp. 119 to 121.)

Know all men by these presents that we, Hugh Butler and Charles W. Wright, of the county of Arapahoe and State of Colorado, as principals, and Dennis Sullivan and Joseph A. Thatcher, of the same county and State, as sureties, are held and firmly bound unto Lewis C. Rockwell, of the said county of Arapahoe and State of Colorado, and Nathan S. Hurd and David A. Gage, executors of the last will and testament of William P. Linn, deceased, in the full and penal sum of twelve thousand dollars ($12,000); for the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Signed with our hands and sealed with our seals and dated this 5th day of January, A. D. 1888.

The condition of the foregoing obligation is such that whereas the above-named Lewis C. Rockwell, as surviving plaintiff, and Nathan S. Hurd and David A. Gage, as executors of the last will and testament of William P. Linn, deceased, did on the 29th
70 day of December, A. D. 1887, recover a judgment in the district court in *in* and for the county of Lake against the above-bounden Hugh Butler and Charles W. Wright for the sum of nine thousand and eight and $\frac{33}{100}$ dollars ($9,008.33) in a certain suit then in said court pending, wherein the said Lewis C. Rockwell was surviving plaintiff and the said Nathan S. Hurd and David A. Gage, as executors of the last will and testament of William P. Linn, deceased, were plaintiffs with said Rockwell, and wherein the said Hugh Butler and Charles W. Wright were defendants, from which said judgment the said Hugh Butler and Charles W. Wright prayed and obtained an appeal to the supreme court of the State of Colorado:

Now, therefore, if the said Hugh Butler and Charles W. Wright shall duly prosecute said appeal and shall pay the judgment appealed from, together with all costs, interest, and damages in case the said judgment shall be affirmed, then the above obligation to be null and void; otherwise to remain in full force and effect.

71 HUGH BUTLER. [SEAL.]
CHARLES W. WRIGHT. [SEAL.]
DENNIS SULLIVAN. [SEAL.]
JOSEPH A. THATCHER. [SEAL.]

Which said appeal bond was and is indorsed as hereon appears:

No. 1513. In the district court within and for the county of Lake. Lewis C. Rockwell, surviving plaintiff, etc., *et al.*, plaintiffs *vs.* Hugh Butler and Charles W. Wright, defendants. Appeal bond. Filed and approved Jan. 17th, 1888. Jos. H. Playter, clerk.

72 (Record, pp. 227 to 243.)

* * * * * * *

And on the same day, to wit, —, said appellants filed in said cause their assignments of error in words and figures as follows, to wit:

STATE OF COLORADO,
In the Supreme Court, } *ss:*

Appeal from the District Court of Lake County.

HUGH BUTLER and CHARLES W. WRIGHT, Appellants,
vs.
LEWIS C. ROCKWELL, Surviving Plaintiff; DAVID A. GAGE and NATHAN S. HURD, Executors of the Last Will and Testament of William P. Linn, Deceased, Plaintiffs and Appellees.
} Assignment of Errors.

And now comes the said appellants, by Hugh Butler and T. D. W. Yonley, their attorneys, and say that in the record and 73 proceedings aforesaid there is manifest error, in this, to wit:

I.

That the court erred in overruling the motion of the defendants to dismiss said suit. (Folio 50.)

II.

The court erred in allowing David A. Gage and Nathan S. Hurd, executors of William P. Linn, deceased, to be made coplaintiffs. (Folio 107.)

III.

The court erred in sustaining the plaintiff Rockwell's demurrer to defendant's answer. (Folio 98.)

IV.

The court erred in sustaining the demurrer by Gage and Hurd, executors, to defendants' answer. (Folio 150.)

V.

The court erred in sustaining the demurrer of plaintiffs to the last paragraph of the last answer of the defendants. (Folio 164.)

VI.

74 The court erred in overruling defendants' motion to quash the deposition of the witness Burrill. (Folio 238.)

VII.

The court erred in sustaining the challenge made by plaintiffs to the juror Trimble. (Folio 243.)

VIII.

The court erred in sustaining the objection to the question put to the witness Wright in regard to the place where the contract inquired of was executed, and in deciding that said Wright was a competent witness only to contradict the witness Burrill or the witness Rockwell on some points testified to by witnesses. (Folio 345.)

IX.

The court erred excluding the offer made by defendants to prove by the witness Wright that "the contract set out in the complaint was executed in the city of Denver, in the State of Colorado, and that at and before the time of the execution of that contract Mr. Linn represented to the defendants Butler and Wright that he was
75 the owner of the American mine described in the contract, situate in California mining district and State of Colorado, as to a one-fourth part thereof; that the said Linn represented that the discovery shaft of said American lode or mine had been sunk down from the surface upon said claim to mineral in place and at a depth of more than ten feet below the surface; that at and before the time of the execution of said contract the said Linn represented unto the said defendants, Butler and Wright, that at the bottom of said discovery shaft mineral-bearing rock of value for silver had been found, and that the said claim had been duly located, staked, and recorded according to law; that by reason of the several acts performed by said Linn and his co-owners in the said location they had become entitled to own and did then own an undivided one-fourth interest in said mining claim, located in accordance with the rules and customs of said mining district, the laws of the State of Colorado and of the United States of America, and that the said Linn was the legal and proper owner of the undivided one-fourth part thereof, and as
76 such owner fully empowered to bargain, sell, and convey the same to defendants; that the defendants, Butler and Wright, relying upon the representations so made by said Linn as aforesaid and believing the same to be true, purchased the said Linn's interest as aforesaid, as stated in said contract made and entered into on the 24th day of May, 1879; that at the time of the execution of this contract the defendants, Butler and Wright, had no personal or other knowledge of or concerning the American mine and location save said representations so made by said Linn; that said representations and each and every of them, except as to the depth of the discovery shaft as aforesaid on said claim, were false and fraudulent and were made by said Linn with the intent to mislead, misinform, deceive, and defraud said defendants and to induce them to make and enter into said contract of purchase; that the defendants, Butler and Wright, were induced by said false representations to enter into said contract in the pleadings in this case mentioned." (Folio 346.)

X.

The court erred in excluding the offer to prove by said witness Wright "that after the making of said contract in the pleadings in this case mentioned and set forth the said defendants informed
77 said Linn that certain persons claiming to own the Little Sliver mine were contesting the claim of said owners of said Ameri-

can mine; that by reason of the conflict of interest and controversy which had arisen it would become necessary that some settlement and adjustment of the controversy should be made, else the reasonable probability would be that the said interest of the said Linn in the said American mine would be entirely lost; that thereupon said Linn authorized and directed the said defendants, Butler and Wright, to enter into an arrangement with the owners of the Little Sliver lode for a settlement and adjustment of said controversies, directing them to do in the premises what they deemed right and most to the interests of the parties concerned." (Folio 349.)

XI.

The court erred in sustaining the objection to the question put to the witness Wright as follows: "What took place upon that occasion?" (Folio 353.)

XII.

The court erred in excluding the offer to prove by said witness Wright "the circumstances under which the assignment was made as a part of the *res gestæ* of the transaction between Wright 78 and Burrill to show that he had knowledge of the condition of this property." (Folio 354.)

XIII.

The court erred in sustaining the objection to the question put to the witness Wright as follows: "Mr. Wright, at the time of the execution and delivery of this contract by Mr. Linn to yourself and Mr. Butler, what did you know, if anything, about the American mine, as to its said development, staking, or anything else?" (Folio 355.)

XIV.

The court erred in sustaining the objection to the following question: "If you had been informed, Mr. Wright, by any one as to what was the then state of development of that mine and its having been staked and the discovery of silver in rock in place therein, state by whom you were so informed." (Folio 356.)

XV.

The court erred in excluding the offer made to prove by said witness Wright as to "the knowledge of the defendants of the state of the American mine, as to its development, staking, and discovery of mineral, location, and the like; what the witness upon the stand knew himself about it without reference to any representa- 79 tions, and that the witness upon the stand had heard nothing at all about the mine and knew nothing about it except what he learned from Mr. Linn." (Folio 357.)

XVI.

The court erred in stopping the witness Wright in his answer and in refusing to permit him to state fully in response to the question put to him. (Folio 358.)

XVII.

The court erred in sustaining the objection to the following question: "What is your belief, Mr. Wright, as to that fact?" (Folio 368.)

XVIII.

The court erred in sustaining the objection to the following question: "If such a conversation had taken place in which you had given that consent or assent, do you think you would have remembered it?" (Folio 369.)

XIX.

The court erred in sustaining the objection to the following question: "I will ask you, Mr. Wright, regarding the contract, whether you would remember that it contained a clause making this contract personal between you and Mr. Linn?" (Folio 369.)

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XX.

The court erred in sustaining the objection to the following question: "If the contract, Mr. Wright, itself contained such a statement as that, I will ask you to state why that was inserted." (Folio 370.)

XXI.

The court erred in sustaining the objection to the following question: "I will ask you, Mr. Wright, whether in inserting that provision in that contract you had any motive?" (Folio 371.)

XXII.

The court erred in refusing to allow the witness to answer the following question: "I will ask you, Mr. Wright, whether at that time there were such controversies, conflicts, and contentions about mining property in California district, in this county, jumpings and such like, and whether it was for many of those causes that that provision was inserted in the contract?" (Folio 372.)

XXIII.

The court erred in refusing to allow the witness to answer the following question: "Was it upon any understanding or agreement that you or Mr. Butler or both of you would assume 81 this control and oversight that the contract was entered into between you and Mr. Linn?" (Folio 373.)

XXIV.

The court erred in refusing to allow the witness to answer the following question: "At the time that the contract was made with

Linn had you any personal knowledge as to the condition of the property?" (Folio 378.)

XXV.

The court erred in excluding the testimony of the witness Sullivan and in refusing the offer of proof made by him, as shown by the testimony of said Sullivan, from folio 386 to 407, inclusive.

XXVI.

The court erred in refusing the offer of proof by the testimony of the witness Kennedy. (Folio 407.)

XXVII.

The court erred in refusing the offer of proof by the testimony of the witness Butler that "the Little Sliver lode or mining claim and the American lode or mining claim covers substantially the same ground and mining property, and that upon investigation it was found that Mr. Linn's title to the American mining claim 82 was inferior to that of the Little Sliver claimants, and that they, the defendants, were thereby forced, in order to save any part of said mining property, to enter into a contract of compromise with the owners of the Little Sliver lode." (Folio 415.)

XXVIII.

The court erred in refusing to permit the witness Butler to testify concerning the reason for making the contract non-assignable. (Folio 416.)

XXIX.

The court erred in instructing the jury as follows on behalf of plaintiffs: "This suit is brought by David A. Gage and Nathan S. Hurd as the legal representatives of William P. Linn, deceased, and Lewis C. Rockwell, as plaintiffs, against Butler and Wright, defendants, to recover the sum of $5,000 under a contract made between them and William P. Linn during his lifetime. The plaintiff Rockwell predicates his right upon an assignment of said contract to him as collateral security. The contract by its terms being non-assignable, the burden is upon Rockwell to show by a fair preponderance of evidence a waiver of that provision by defendants and their consent to such assignment to him."

XXX.

The court erred in instructing the jury as follows on behalf 83 of plaintiffs: "The court instructs the jury that if they believe from the evidence that Rockwell applied to Butler and Wright and asked their consent for Burrill to assign the contract in suit to him, Rockwell then informing them he was about to loan him money upon it, and they gave their assent to such assignment, then Rockwell can recover with the executors in this case."

XXXI.

The court erred in instructing the jury as follows: "The court instructs the jury that whether the contract sued on was assigned with the consent of either or both of the defendants is not important, except to determine who shall recover a judgment, for if it was not legally assigned to Rockwell the right to recover thereon remained in Linn and survives and passes to the executors, and they may recover in this suit the same as if they had sued alone, if a breach of contract is shown that warrants a recovery against the defendants or either of them."

XXXII.

The court erred in instructing the jury as follows: "The court
instructs the jury that when Butler and Wright made the compro-
mise contract with Moffat, Wolcott, and James, dated October 25,
1879, they thereby put it out of their power to comply with
84 the terms, clauses, and conditions of the contract which they
made with Linn, and the $5,000 balance of the purchase-
money on the American mine at once became due and payable
under said contract.

XXXIII.

The court erred in instructing the jury as follows: "The court further instructs the jury that there is no evidence in this case showing that there ever was any change or modification of the contract between Linn and Butler and Wright; that the jury must consider it as never having been changed or modified."

XXXIV.

The court erred in instructing the jury as follows: "The court instructs the jury that if they believe from the evidence that Burrill had notice of the modification of the contract between Linn and the defendants by his conversations with Wright, said notice did not effect Rockwell, as he claims under Linn and not under Burrill."

XXXV.

The court erred in giving to the jury the following instruction:
"If the jury find for the plaintiffs they are entitled to have in-
terest upon the five thousand dollars from the date of the
85 making the compromise agreement between the owners of
the American and Little Sliver lodes, which was on the 25th
day of October, 1879, until this date at the rate of 10 per cent. a
year."

XXXVI.

The court erred in refusing to give to the jury, on behalf and at the request of the defendants, the following instruction: "That the burden is on the plaintiffs to prove every material allegation in their complaint which is put in issue by the answer of the defendants by a preponderance of evidence; and if the jury find plaintiffs have failed to prove any material allegation of their complaint so put in issue by the answer of the defendants by such preponderance of evidence, then the jury must return a verdict for the defendant."

XXXVII.

The court erred in refusing to give to the jury, on behalf of the defendants, the following instruction: "That to entitle plaintiff to a verdict in this case the jury must be satisfied from the evidence (1) that both the defendants, Butler and Wright, consented to the assignment of the contract sued on being made from said Linn to said Burrill, and that the consent of the defendant Wright to such as-
signment being made is not sufficient to give a right of action
86 to said plaintiff Rockwell against said defendant; (2) that if
the jury believed from the evidence that at the time of said assignment of the contract sued on in this action by said Linn to said Burrill the said Burrill had knowledge and notice of such contract, the compromise between claimants of the American and Little Sliver claims, and all the terms and conditions of such compromise, and accepted said assignment of said contract after having received this notice and knowledge, then the said plaintiffs cannot recover in this action, and that such notice to Burrill is notice to said Rockwell."

XXXVIII.

The court erred in refusing to instruct the jury as follows: "If the jury believe from the evidence that at the time the said Wright consented to the assignment by the said Linn to the said Burrill of the contract sued on herein the said Burrill had knowledge and notice of said contract of compromise between the respective claimants of the American and Little Sliver claims and of the terms and
conditions of said compromise and accepted said assignment
87 of said contract after having received this notice and knowl-
edge, then the said plaintiffs cannot recover in this action."

XXXIX.

The court erred in refusing to instruct the jury as follows: "That to entitle plaintiffs to a verdict in this case the jury must believe from the evidence that at the time of making of said contract between said Linn and said defendants, sued on in this action, the said Linn was the owner of an equal undivided one-fourth interest in and to said so-called American mine, acquired thereto by a due and proper location of said claim; that by reason of said contract of compromise set out in the plaintiffs' complaint it could not and cannot be learned or ascertained by plaintiffs or defendants what amount of ore had been, was being, or might thereafter be taken out of said American mine since the execution of said contract of compromise by said defendants or said parties to said contract of compromise; that it cannot be ascertained what amount of ore is one-fourth which

has been or is being taken from said American lode by the parties working the same; that it cannot be learned
88 or ascertained by reason of said contract of compromise
what amount of money has been or is being taken out of said American mine by said parties to said compromise or any or either of them; that by reason of said contract of compromise it cannot be learned or ascertained how much ore has been or is being taken out and sold by the parties working said American mine; that by reason of said contract of compromise it cannot be learned or ascertained how much or what is the amount of the improvements which have been or are being placed on said American lode by defendants or by parties working the same, and that by reason of said compromise defendants have put the management and control, as regards the working of said American mine, beyond their power or control, and thereby rendered it impossible for them or defendants to carry out or perform the covenants and conditions of the defendants' said contract with said Linn, and if the said plaintiffs have failed to prove either of the foregoing propositions by a preponderance of evidence, then the jury must find a verdict for the defendants."

89

XL.

The court erred in refusing to instruct the jury as follows: "The court instructs the jury that by the pleadings in this cause it is expressly admitted by the parties to this cause that before said contract of compromise was made and entered into between the respective claimants to the Little Sliver claim and the American claim the said Linn was notified of said contemplated agreement and of the necessity existing for making a compromise, and that the said Linn expressly advised defendants to make the best compromise they could, and after said compromise agreement was made the said Linn was duly notified thereof and of its covenants, terms, and conditions, and the said Linn did then ratify and consent thereto, you will therefore find the issues herein joined for the defendants."

XLI.

The court erred in refusing to instruct the jury as follows: "If the jury shall believe from the evidence that the contract sued on in this cause was assigned to the said Burrill by the consent of
90 the defendants, and if the jury shall further believe from the
evidence that the said Burrill received his said contract with notice and knowledge of said agreement of compromise between the respective claimants of the American and Little Sliver mines or claims, and, notwithstanding this notice and knowledge, he received and took said contract between said Linn and said defendants with the intent and purpose of looking to the production of mineral from said mine or its sale for cash alone for his money, then and in that case he will be held to have ratified said contract of compromise, and the same will furnish him no cause for complaint and will not furnish cause for complaint by said Burrill, assignee, or the plaintiff Rock-

well, and you will therefore find the issues herein joined for defendants."

XLII.

The court erred in overruling the defendants' motion for a new trial.

XLIII.

The court erred in rendering judgment upon the verdict of the jury in favor of plaintiffs and against the defendants.

91 Wherefore, by reason of the errors aforesaid, the said appellants pray that said judgment *by* reversed and the said cause be remanded for further proceedings according to law.

(Signed) HUGH BUTLER,
T. D. W. YONLEY,
Attorneys for Appellants.

Endorsed as follows:

No. 2269. In the supreme court of the State of Colorado. Hugh Butler and Charles W. Wright, appellants, *vs.* Lewis C. Rockwell, surviving plaintiff; David A. Gage, and Nathan S. Hurd,
92 executors of the last will and testament of William P. Linn, deceased, plaintiffs and appellees. Assignment of errors. Filed in supreme court April 5th, 1888. James A. Miller, clerk. T. D. W. Yonley, Hugh Butler, appellants' attorneys.

93 (Record, pp. 244 & 245.)

Afterwards and on, to wit, April 27, A. D. 1888, there was filed in said cause by appellees their joinder in error in words and figures as follows, to wit:

STATE OF COLORADO:

In the Supreme Court Thereof, to the April Term, A. D. 1888.

HUGH BUTLER *et al.*, Appellants,
vs.
L. C. ROCKWELL *et al.*, Appellees.

Now come the said appellees, by L. C. Rockwell, their attorney, and say that in the record and proceedings aforesaid and in giving judgment in manner and form as the same is therein given there is no error.

Wherefore appellees ask that said judgment may in all things be affirmed.

L. C. ROCKWELL,
Att'y for Appellees.

94 And which joinder in error is endorsed as follows:

No. 2269. In the supreme court of the State of Colorado. Hugh Butler *et al.*, appellants, *vs.* L. C. Rockwell *et al.*, appellees.

Joinder in error. Filed in supreme court April 27, 1888. James A. Miller, clerk. L. C. Rockwell, att'y for appellees.

95 (Record, p. 253.)

* * * * * * *

And afterwards, on, to wit, September 27, A. D. 1889, there was filed in said cause a certain stipulation in words and figures as follows, to wit:

STATE OF COLORADO, *ss:*

In the Supreme Court, of the September Term Thereof, 1889.

HUGH BUTLER and CHARLES W. WRIGHT, Appellants,
vs.
L. C. ROCKWELL *et al.*, Appellees.

It is hereby stipulated and agreed by and between the parties hereto that this cause may be set down for oral argument on Wednesday, the 16th day of October, 1889.

HUGH BUTLER,
L. C. ROCKWELL, *Att'y pro se.*

Endorsed as follows:

2269. Butler *et al. vs.* Rockwell. Stipulation for oral argument before commission. Filed in supreme court September 27th, 1889. James A. Miller, clerk.

96 (Record, p. 252.)

* * * * * * *

And on, to wit, September 13, A. D. 1889, the same being one of the juridical days of the September, A. D. 1889, term of said supreme court—present, Honorable J. C. Helm, chief justice; Honorable V. A. Elliott, and Chas. D. Hays, justice-; Albert H. Weber, Esq., sheriff of Arapahoe county, by F. A. Richardson, bailiff, and James A. Miller, clerk—the following further proceedings were had and entered of record in said cause as follows, to wit:

HUGH BUTLER *et al.*, Appellants,
vs.
L. C. ROCKWELL *et al.*, Appellees.
2269.
Appeal from District Court of Lake County.

As this day, upon the motion of appellants, and it appearing that this cause comes within the provisions of rule 51 of this court, 97 it is ordered by the court that this cause be, and is hereby, advanced for hearing, and that the same is hereby assigned to the supreme court commission for consideration and report and for oral argument at such time as said commission shall order.

98 (Record, pp. 254 & 255.)

* * * * * * *

And afterwards and on, to wit, the 24th day of December, A. D. 1889, the same being one of the juridical days of the September, A. D.

1889, term of said supreme court—present, Honorable J. C. Helm, chief justice: V. A. Elliott and Chas. D. Hoyt, justices; A. H. Weber, sheriff of Arapahoe county, by F. A. Richardson, bailiff, and James A. Miller, clerk—the following further proceedings were had and entered of record in said cause in words as follows, to wit:

HUGH BUTLER and CHARLES W. WRIGHT, Appellants,
vs.
LEWIS C. ROCKWELL, Surviving Plaintiff; DAVID A. GAGE and NATHAN S. HURD, Executors of the Last Will and Testament of William P. Linn, Deceased, Appellees.

No. 2269.
Appeal from District Court of Lake County.

99 At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Lake as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said district court for such other and further proceedings according to law as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said appellees do have and recover of and from said appellants their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the court filed herein be recorded.

100 (Record, pp. 272 to 280.)

* * * * * * *

And afterwards and on January 7th, A. D. 1890, come said appellants and file in said cause their petition for a rehearing thereof in words and figures as follows:

STATE OF COLORADO, *ss:*

In the Supreme Court.

HUGH BUTLER and CHARLES W. WRIGHT, Appellants,
vs.
DAVID A. GAGE and NATHAN S. HURD, Executors of William P. Linn, Deceased, and L. C. ROCKWELL, Appellees.

Appeal from the district court of Lake county.

Petition for Rehearing.

And now come the said appellants, by Hugh Butler, one of said appellants, and pray that a rehearing of this cause be allowed, and for cause show:

101 1. The court erred in deciding and in saying:

"In instituting the suit William P. Linn was made a plaintiff with L. C. Rockwell, and so remained without a challenge or objection, as far as is disclosed by the record of the proceedings in the first instance. It is true that the only adjudication in that court was upon the general demurrer to the complaint, but, under our code of practice, the objection that the plaintiff had no legal capacity to sue or that there was a defect or misjoinder of parties plaintiff or defendant could have been made and determined upon the demurrer. Code, sec. 55, p. 18. This was not done. The question in regard to Linn's being a proper party does not appear to have been raised until after the *deposition* of the case in this court on writ of error and the death of Linn. Upon its being remanded for further proceedings the question first arose on motion to substitute the executors in place of the deceased plaintiff. So far defendants must be held to have acquiesced, if not in the necessity of Linn's being a plaintiff, at least in the propriety of it."

102 The defendants in their demurrer to the original compliant raised the question of parties, but they contended that Linn was the proper party and the only party who had the right to sue. They insisted that Rockwell had no status in the case as a party. In the last ground of special demurrer set up in the demurrer they said: "That by the terms of said agreement with Linn the same was made non-negotiable, and it is not shown in said complaint that defendants agreed in writing, or for any consideration, to fulfil the same with any other person or persons save the said Linn." The court, therefore, has misconstrued the contention of the defendants then and now. Their position was that Linn, during his lifetime, was the only proper party, and after his death the executors were the only proper parties, and that by their refusal to prosecute the suit it became discontinued as to them in December, 1885.

2. The right of action was in one of the parties plaintiff, not in both. The defendants were entitled to have that question settled before trial. It was important, as admitted in the opinion of the court, because it affected the defendants' right to give evidence.

103 3. The court in its opinion argues that Rockwell was a pledgee only, and that the right of action was in Linn first and his executors afterwards, and yet during the trial Rockwell was held out as the substantial plaintiff. If Rockwell was the real party in interest the defendants were entitled to testify, and they were excluded because the executors, though not the real parties in interest, were joined as plaintiffs.

The court said:

"We do not intend to be understood as saying that either Linn or his executors were absolutely indispensable parties, and that Rockwell could not have prosecuted as sole plaintiff, but that Linn, and after him his executors, had a legal right to be parties at their own election."

And the court further said:

"The ultimate effect of making the executors plaintiffs may have been disastrous to defendants by placing them under a disability in establishing a defence."

4. Thus two questions are discussed in the opinion, but
104 neither decided: First. Did Rockwell have such an interest as
entitled him to sue as sole plaintiff? If so, defendants were erroneously denied their right to testify. Second. Was Rockwell a pledgee only and the legal title as well as the right to sue in Linn and his executors only? If so, it became the duty of the court to decide the question of discontinuance raised against them. But instead of this the case was tried first on one theory and then on the other, and neither theory followed to *be* a conclusion, and the judgment here is defended and affirmed in the same way.

5. The court erred in deciding and saying:

"The defence of misrepresentations on the part of Linn in regard to title, rights, and development of the property sold to induce the purchase was untenable, first, from the character of the conveyance made by Linn; second, from the conduct of defendants after the purchase, which resulted in law in affirmance and ratification. When defendants went into the possession and occupation of the property and found they had been deceived by he statements of
Linn they could have either rescinded at once or affirmed
105 and brought an action in the nature of an action on the case
at common law for damages for the deceit and recouped or set off such damages against their own obligation to pay.

"Neither was done. Having entered into the occupation of the property and proceeded to exercise rights of ownership and to deal with it as their own, they were estopped and precluded from asserting the defense set up, except by establishing by evidence the modification of the contract, as alleged."

First, as to the character of the conveyance. It is true that the deed was a quitclaim only. The conveyance, standing by itself, might not be evidence of misrepresentation, but coupled with other circumstances it may well be that there was a representation which induced the purchase, although the conveyance was by quitclaim only.

In this case it was averred in the complaint: "First, that on the 24th day of May, A. D. 1879, the plaintiff, William P. Linn, was the owner of and in possession of an equal undivided one-fourth interest in and to the American mine, lode, ledge, or deposit situate in
California mining district, Lake county, Colorado." The
106 answer denied what the plaintiff affirmed in that respect, and
the proof offered in support of the answer and in contradiction of the complaint was by testimony other than that of defendants, but the evidence was excluded.

7. The court erred in deciding and in saying:

"Such a position was clearly untenable, certainly anomalous, and an attempt to abate the suit, first as to one plaintiff and then as to the other, piecemeal. At common law the pleader was required in a plea in abatement not only to show that the parties were not the proper ones, but to show who were. In the language of the books, 'to give a better writ.' Here the attempt was in effect to bar the suit by matter in abatement, which could hardly be done, even under our Civil Code."

There is now no such thing as a plea in abatement. The idea, as well as the plea, is *a*bsolete. The objection as to parties can be raised by demurrer or answer, and whether the objection be in its
nature in abatement or in bar it is enough to show that the
107 plaintiff is not entitled to sue, and this question was raised
both by answer and demurrer, and in the objection to Rockwell's right to sue it was shown that the right was in Linn during his lifetime, and after his death in his executors, and that by their refusal to prosecute the suit was discontinued. The objection was made promptly, and the executors had their election to stay in or go out. They elected to go out and keep out.

The court erred in saying:

"They (meaning the executors) could not be precluded at the option of defendants, nor could their right to be parties be extinguished by the act of Rockwell asking to be made the sole plaintiff and the action of the court in making him so."

The executors were not excluded by the act of Rockwell or by the act of the court, except by their own consent. Their attorney (Clinton Reed), not Rockwell, made the motion to substitute Rockwell as sole plaintiff, and the effort to bring the executors back into
the suit was initiated, not by them, but by Rockwell. It was
108 only at his evident intercession that they attempted to come
back.

The court erred in saying: "From the conduct of defendants after the purchase, which resulted in law in affirmance and ratification when the defendants went into the possession and occupation of the property and found that they had been deceived by the statements of Linn, they could have either rescinded at once or affimed and brought an action in the nature of an action on the case at common law for damages for the deceit and recouped or set off such damages against their own obligation to pay. Neither was done. Having entered into the occupation of the property and proceeded to exercise the rights of ownership and to deal with it as their own, they were estopped and precluded from asserting the defence set up," &c.

They could not well do otherwise than they did. A suit might have been unavailing. If Linn was insolvent their remedy would have been valueless. If they had rescinded they would have lost
the $750 already paid on account of the purchase and several
109 thousand dollars more than expended in the development of
the property, and a judgment, although for the whole loss, would not have been an adequate satisfaction unless Linn was solvent.

A party is never required to take a certain course by election which is sure to result in loss when he can take another course which promises better results. In this case there was, according to plaintiff's own showing, an implied representation by the plaintiff that he was the owner of an undivided one-fourth of a mine called the American mine, out of which defendants agreed to pay from the ores and metals to be mined therefrom $5,000, or if they sold such mine, then to pay such sum out of the purchase-money received therefor.

There was no mine, in a legal sense, unless there had been a discovery of mineral in place' by plaintiff and his grantors and unless he or they had otherwise in all respects complied with the law in respect to the discovery and location of mines. In other words, the parties dealt on the assumption that there was a property and a fund in existence out of which to realize the expected sum 110 of $5,750. Now, if there was no mine, no property, and no fund in existence on which the agreement could operate is it to be said that the defendants were liable because they received and retained possession of a naken piece of ground which was still a part of the public domain of the United States? And cannot this fact be shown by competent evidence even if Linn was guiltless of fraud? Is it not a fact, whether connected with fraud or not, which is the legitimate subject of inquiry and proof by competent evidence? We submit that it is. This phase of the question has evidently not been considered or decided by the court. The principle of estoppel invoked by the court does not apply.

8. The court in deciding that defendants were not competent witnesses overlooked and did not decide the point that the suit was not brought by Linn's executors. It was brought in Linn's name during his lifetime. When the suit was commenced the defendants were competent witnesses. Did they lose the right to testify by Linn's death? We contend that they did not. At any rate this court has not decided the point.

111 9. The court erred in saying:

"The court below was warranted in finding that the matter relied upon had been considered and determined by this court on a writ in a former case and were *res adjudicata*, and in so regarding and treating them."

In this the court was clearly mistaken. The matters sought to be proved by the testimony of Sullivan and others, who were competent witnesses, were wholly new and had not been considered on hearing of the writ of error, and hence they were not and could not be *res adjudicata*.

As permission has been given to file a brief in support of this petition I refrain for the present from any further statements or elaboration of the errors complained of.

Respectfully submitted.
January 7th, 1890.
(Signed) HUGH BUTLER,
For Petitioner- and Appellants.

112 Endorsed as follows:

2269. In the supreme court. Hugh Butler and Charles W. Wright, appellants, *vs.* David A. Gage and Nathan S. Hurd, executors of William P. Linn, deceased, and L. C. Rockwell, appellees. Petition for rehearing. Filed in supreme court January 7th, 1890. James A. Miller, clerk.

113 (Record, p. 281.)

And on, to wit, the 28th day of March, A. D. 1890, the same being a juridical day of the January, A. D. 1890, term of said supreme court—present, Honorable J. C. Helm, chief justice; Honorable V. A. Elliot and Honorable Chas. D. Hayt, justices; E. R. Barton, Esq., sheriff of Arapahoe county, by F. A. Richardson, bailiff, and James A. Miller, clerk—the following further proceedings were had and entered of record in said cause, to wit:

HUGH BUTLER *et al.*, Appellants,
vs.
L. C. ROCKWELL *et al.*, Appellees. } No. 2269.

Appeal from district court of Lake county.

At this day, upon consideration thereof, it is ordered by the court that appellants' petition for a rehearing herein be, and the same is hereby, denied.

114 (Record, pp. 286 & 287.)

* * * * * * *

And afterwards and on May 16, A. D. 1890, there was filed by said appellants in said cause their motion in words and figures as follows, to wit:

STATE OF COLORADO, *ss:*

In the Supreme Court.

HUGH BUTLER and CHARLES W. WRIGHT, Appellants,
vs.
NATHAN S. HURD and DAVID A. GAGE, Executors of William P. Linn, Deceased, and LEWIS C. ROCKWELL, Appellees.

And now come the said appellants and move the court to grant an oral argument on the merits of this cause *and* appeal in and before this court, and that in the meantime no mandate, remittitur, or process issue herein to affirm or enforce in any way the judgment of the said district court of Lake county complained of and appealed from.

115 Dated at Denver, Colo., this 16th day of May, A. D. 1890.

HUGH BUTLER,
Attorney for Appellants.

Endorsed as follows:

2269. In the supreme court. Hugh Butler and Charles W. Wright, appellants, *vs.* Nathan S. Hurd and David A. Gage, executors of William P. Linn, deceased, and Lewis C. Rockwell, appellees. Motion for oral argument, &c. Filed in supreme court May 16, 1890. James A. Miller, clerk. Hugh Butler, att'y for app'l'nts.

116 (Record, pp. 289 & 290.)

* * * * * * *

The following further proceedings were had and entered of record in said cause, to wit:

Hugh Butler *et al.*, Appellants,
vs.
L. C. Rockwell *et al.*, Appellees.
} Appeal from District Court of Lake County.

At this day, upon consideration thereof and being now fully advised *on* the premises, it is ordered by the court that the motion of said appellants for an oral argument in this cause and that said cause be not remanded until the determination of said motion be, and the same is hereby, overruled.

117 (Record, pp. 1 and 2.)

The United States of America.

United States of America, }
District of Colorado, } *ss:*

The President of the United States to the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, between Hugh Butler and Charles W. Wright and David A. Gage and Nathan S. Hurd, executors of the last will of William P. Linn, deceased, and Lewis C. Rockwell, a manifest error hath happened, to the great damage of the said Hugh Butler and Charles W. Wright, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
118 at Washington, District of Columbia, together with this writ,
so that you have the same at said city of Washington on the second Tuesday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of May, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

Seal of the United States
Circuit Court, District
of Colorado.

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Allowed by—
—— ——, *Judge.*

119 *Return.*

THE UNITED STATES OF AMERICA, } *ss:*
State of Colorado,

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal of the Supreme Court of the State of Colorado.

Witness my hand and the seal of said supreme court, at Denver, in said State, this first day of July, 1890.

JAMES A. MILLER, *Clerk,*
By —— ——, *Deputy Clerk.*

(Endorsed:) Hugh Butler and Charles W. Wright, plaintiff- in error, *vs.* David A. Gage, Nathan S. Hurd, *et al.* Writ of error to supreme court of the State of Colorado. Filed in supreme court May 27, 1890. James A. Miller, clerk.

* * * * * * *

120 (Record, p. 302 to 304.)

* * * * * * *

And on the same day, to wit, the 27th day of May, A. D. 1890, citation was issued upon the writ of error hereto annexed, and which said citation and proof of service thereof *is* as follows, to wit:

THE UNITED STATES OF AMERICA:

Supreme Court, District of Colorado.

The United States of America to Nathan S. Hurd and David A. Gage, executors of the last will and testament of William P. Linn, deceased, and Lewis C. Rockwell, Greeting:

You are hereby cited and admonished to be and appear at a regular court of the United States Supreme Court, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein Hugh Butler and Charles W. Wright are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. Security and bond for costs and damages have been filed and are of record, as required by law. 121

Witness the Honorable Chas. D. Hayt, presiding justice of the supreme court of the State of Colorado, this 27th day of May, in the year of our Lord one thousand eight hundred and ninety.

CHAS. D. HAYT,
Presiding Judge of the Supreme Court of the State of Colorado

STATE OF COLORADO, *ss:*

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify that I did on May 31, 1890, deliver to L. C. Rockwell and Nathan S. Hurd, defendants in error named herein, each a true copy hereof, the same having been lodged with me by said plaintiffs in error for such delivery on the 27th day of May, A. D. 1890.

122

Seal Supreme Court,
State of Colorado.

Witness my hand and seal of said supreme court hereto affixed this 31st day of May, A. D. 1890.

JAMES A. MILLER,
Clerk Supreme Court, Colorado.

Endorsed as follows:

2269. Hugh Butler *et al.*, plaintiffs in error, *vs.* L. C. Rockwell *et al.*, defendants in error. Citation to Supreme Court of United States and proof of service. Filed in supreme court May 27, 1890. James A. Miller, clerk.

123 (Record, p. 297.)

* * * * * * *

STATE OF COLORADO:

Desiring to give petitioners and opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said court, and that the same be made a supersedeas, the bond, in the penal sum of sixteen thousand dollars, herewith presented being approved.

In testimony whereof witness my hand this 27th day of May, A. D. 1890, the chief justice being absent.

CHAS. D. HAYT,
Presiding Judge of the Supreme Court of the State of Colorado.

124 (Record, pp. 299 to 301.)

* * * * * * *

And thereupon, and on the same day as last aforesaid, come again said appellants, by Hugh Butler, Esq., their attorney, and file in the office of the clerk of said court their supersedeas bond; which said bond and the approval thereof is in words and figures as follows, to wit:

Know all men by these presents that we, Hugh Butler and Joseph A. Thatcher and Dennis Sullivan, are held and firmly bound unto Nathan S. Hurd and David A. Gage, executors of the last will and testament of William P. Linn, deceased, and Lewis C. Rockwell in the full and just sum of sixteen thousand dollars, to be paid to the said Nathan S. Hurd and David A. Gage, executors, &c., and Lewis C. Rockwell, their certain executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of May, in the year of our Lord one thousand eight hundred and ninety.

125 Whereas lately, at a term of the supreme court of the State of Colorado, in a suit depending in said court between Hugh Butler and Charles W. Wright, appellants, against Nathan S. Hurd and David A. Gage, executors of the last will and testament of William P. Linn, deceased, and Lewis C. Rockwell, appellees, a judgment was rendered against the said appellants; and the said Hugh Butler and Charles W. Wright, appellants, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment of said supreme court in the aforesaid suit, and a citation directed to the said Nathan S. Hurd and David A. Gage, executors, &c., and Lewis C. Rockwell, appellees, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington on the — Monday of October next:

Now, the condition of this obligation is such that if the said Hugh Butler and Charles W. Wright shall prosecute the said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HUGH BUTLER. [SEAL.]
126 J. A. THATCHER. [SEAL.]
DENNIS SULLIVAN. [SEAL.]

Approved this 27th day of May, A. D. 1890.

CHARLES D. HAYT,
Presiding Judge of the Supreme Court of the State of Colorado.

Endorsed as follows:

2269. Hugh Butler *et al.*, plaintiffs in error, *vs.* L. C. Rockwell *et al.*, defendants in error. Supersedeas bond on writ of error and supersedeas to Supreme Court of the United States. Filed in Supreme Court May 27, 1890. James A. Miller, clerk.

127 (Record, pp. 255 to 271.)

* * * * * * *

And thereupon, and on the same day and during the said session, the court ordered filed its opinion in said cause, and which opinion so filed aforesaid is in the words and figures as follows, to wit:

BUTLER *et al.*
vs.
ROCKWELL *et al.*

The complaint upon which the cause was tried was the original complaint, to which a general demurrer was filed, defendants alleging that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The case was brought to this court on error, where the judgment of the court below was reversed and the cause remanded for further proceedings. Linn *v.*

Butler, 8 Colo., 355; 8 Pac. Rep., 588. The portions of the com-
plaint necessary to an understanding of the case are as follows:
"(1.) That on the 24th day of May, A. D. 1879, the plaintiff, Wil-
liam P. Linn, was the owner of and in possession of an equal
128 undivided one-fourth ($\frac{1}{4}$) interest in and to the American
mine, lode, ledge, or deposit, situated in California mining
district, Lake county, Colorado. * * * (2.) That upon the day
and year last aforesaid said Linn sold his right, title, and interest
in and to said American mine to the defendants for the sum of five
thousand seven hundred and fifty dollars ($5,750), which sale was
evidenced by the following agreement in writing in words and fig-
ures following, and is made part of the complaint, to wit: 'This
agreement, in duplicate, made and entered into this 24th day of
May, A. D. 1879, by and between W. P. Linn, party of the first part,
and Hugh Butler and C. W. Wright, parties of the second part:
Whereas, on the day of the date hereof, said second parties pur-
chased of and from said Linn his right and title in and to the
American mine for the sum of five thousand seven hundred and
fifty dollars ($5,750), payable in installments—that is to say,
two hundred and fifty dollars ($250), which has already been
paid, receipt whereof is hereby confessed; two hundred and fifty
dollars ($250) in thirty (30) days next after the date hereof, two hun-
dred and fifty dollars ($250) in sixty days next after the date
129 hereof, and the remaining five thousand dollars ($5,000) out
of the net proceeds of said mine, as hereinafter specified;
whereas, in pursuance of said agreement, said Linn hath on this day,
in due form, conveyed unto said second parties said interest in said
mine: Now, therefore, this agreement witnesseth that for and in
consideration of the premises it is mutually agreed by and between
said parties that this agreement shall not be assignable or negotiable,
and that the sums of money herein agreed to be paid shall be due
and payable to the said Linn, and only to him and to none other;
and it is further agreed on the part of said second parties that they
will, at the end of thirty (30) days next after the date hereof, pay
unto said Linn said sum of two hundred and fifty dollars ($250),
and in thirty (30) days next thereafter a like sum, and that they
will also pay unto said Linn the remaining installment of five thou-
sand dollars ($5,000), it being well understood, however, that said
payment of five thousand dollars ($5,000) shall only be due and payable
upon the terms and conditions herein—that is to say, that said
130 latter sum shall be due and payable only out of the net pro-
ceeds received from the sale of ore taken from the said Amer-
ican mine by said second parties, such net proceeds to be the net
proceeds aforesaid of the individual one-fourth ($\frac{1}{4}$) interest of said
mine, that being the interest conveyed by said Linn to said second
parties; and it is hereby further agreed and fully understood that
the net proceeds above specified shall be construed only to mean the
money received by said second parties from the sale of ores mined
and taken from said mine by them on account of said one-fourth ($\frac{1}{4}$)
interest, and left remaining in hand after paying all expenses of
such mining, as well also all moneys advanced by said second par-

ties or paid out by them for and on account of said undivided one-fourth (¼) interest, including the seven hundred and fifty dollars ($750) paid on account of the purchase of said one-fourth (¼) interest, and in case of sale by said second parties of said interest, then and in that event said five thousand dollars shall at once become due and payable.

131 In witness whereof said parties have hereunto set their hand on this the day and year first hereinabove written.

HUGH BUTLER.
C. W. WRIGHT.
WM. P. LINN.

(3.) And afterwards and on the 5th day of April last past said Linn, for a good and valuable consideration, assigned in writing to Charles F. Burrell his right, title, and interest in and to the foregoing agreement as security for the loan of twenty-seven hundred dollars ($2,700), before then made by said Linn from said Burrell, which assignment was made with the knowledge and consent of said defendants.

And afterwards and on the 29th day of October last past said Charles F. Burrell, for a good and valuable consideration, assigned and set over in writing all his right, title, and interest in and to said contract to Lewis C. Rockwell, who now holds said contract as collateral security for money heretofore loaned by him to said Wm. P. Linn.

On the 5th of December, 1885, the defendant moved the court to dismiss the cause for the reason: "Because it appears from the suggestion of the plaintiff of record in this cause that Wm. P. Linn, the former coplaintiff of said Rockwell, has since the
132 institution of the suit departed this life, and because the action
does not accrue to or survive in the said plaintiff, Lewis C. Rockwell;" which motion was argued and on March 12, 1886, was overruled by the court. On the same date defendants filed a demurrer to the complaint, which was likewise overruled. On the 14th of April following they filed their answer to the complaint. On April 30th the plaintiff, L. C. Rockwell, filed a motion that David A. Gage and Nathan S. Hurd, executors of Linn, deceased, be made coplaintiffs with him in the case, assigning that the reasons or grounds of said motion were: "First, because defendants by motion and in answer insist that plaintiff is not the real party in interest in this case; second, because defendants insist the contract sued on was not assignable by Linn, and hence L. C. Rockwell has no right to receive the money due thereon;" which motion was supported by the affidavit of S. C. Rockwell and was argued by counsel and taken under advisement by the court. On the same day plaintiff filed a demurrer to the answer of defendants.

On the 25th of June Nathan S. Hurd filed a petition asking
133 that David A. Gage and himself, executors, be made co-
plaintiffs with Rockwell. On the 23rd of November following, by consent of counsel, an order was made that counsel respectively submit briefs in regard to the making of the executors co-

plaintiffs on or before December 15th. On January 10, 1887, an order was entered making the executors parties, to which defendants excepted, and they were required by the court to prepare and tender a bill of exceptions within 60 days. In the first paragraph of the answer defendants admit the making of the contract as alleged in the complaint. The second paragraph is as follows: "They deny that said contract was assigned to the said Charles F. Burrell with the knowledge and consent of said defendants, and they deny that they ever assented to the assignment of said contract either to the said Burrell or to the said Rockwell." It is also averred that at some time thereafter, which date is not give-, Moffat and others began to sink a shaft on a small strip of unoccupied land near the
line of the American claim, and discovered mineral in such
134 shaft before any was discovered in the American mine, and
that the vein or ledge found by Moffat and others was the same as that alleged by Linn to have been found in the American claim previous to the sale; that defendants immediately informed Linn of the finding of the ore by Moffat and others, and of the fact that the shaft of the American mine had not been sunk to mineral, and he again asserted that the ore had been found in the American mine before the other shaft had been commenced; that, after having found the mineral or ore in the shaft and fully complying with the law, Moffat and others made application for a patent from the United States Government to the ground under the name of "The Little Sliver," and that the application so made embraced a large part of the ground claimed as the American claim; that defendants, by the advice and at the request of Linn, joined the other owners of the American claim and filed an adverse claim in the United States land office against the application of Moffat and others for a patent to the Little Sliver mine, and within the time
prescribed by law brought suit in the district court
135 for Lake county in support of said adverse claim; that in
preparing for the trial of the case defendants learned that the representations made by Linn that mineral in place had been found in the shaft on the American mine were false; and that mineral in place had been first found on the Little Sliver claim, and that the location of the American mine was invalid. In the ninth paragraph defendants aver in effect that they stated all the facts to Linn, and that he advised defendants to make a compromise with the claimants of the Little Sliver lode, and stated to and agreed with defendants that any compromise that they might make would be satisfactory to him, and that he would change and modify the existing contract so as to relieve the defendants from its expressed terms. And in the tenth paragraph it is averred that, after making the compromise and consolidation of the two conflicting claims, defendants immediately and fully informed Linn of the said settlement and
transaction, and that he assented to and ratified the same, and
136 that it was agreed that the contract existing should be so mod-
ified that the interest of defendants in the consolidated property should be substituted for the payment of the money in place of of the property sold by Linn to defendants. The fourteenth and

part of the fifteenth paragraphs of the answer are as follows: "Said defendants further aver that it was stipulated by and between the said Linn and these defendants in said original contract, as well as in said supplemental contract, assenting to the settlement, adjustment, and compromise as aforesaid, that all the rights, benefits, and privileges of the said Linn and the right to demand and receive any and all moneys that might come to him under said contract should not be assignable, and that the same should be payable to the said Linn only, and that the same was a joint and not a several contract on the part of these defendants; and they aver that they have never agreed or consented to any assignment of said contract or any part thereof or any interest therein either to the said Burrell or to the said Rockwell; and they deny that the said Rockwell is now the owner of said contract or any part thereof or any interest
137 therein; and they deny his right to maintain this suit against them.

(15.) And defendants further aver, upon information and belief, that the supposed assignment of said contract to said plaintiff was only for the purpose of securing the payment to said Rockwell of certain debts and claims held by said Rockwell against said Linn; and they further aver, upon information and belief, that the said debts and claims have been fully paid and satisfied. * * *

In the seventeenth paragraph it is in substance averred that the plaintiff Linn died pending the decision of the writ of error in this court; that no application was made by the executors to become parties to the same; that after the cause was remanded Rockwell, with the knowledge and consent of the executors, applied to be and was made sole plaintiff, and that for those reasons the suit was discontinued as to them, and that they had no right to prosecute and maintain this suit against the defendants. Plaintiffs replied to the answer at great length, traversing and denying all the material averments in the answer. Trial was had in the latter part of
138 December, 1887, resulting in a judgment in favor of plaintiffs for the sum of $9,008.33.

Reed, *C.:* There are in this case 43 errors assigned upon the record, but a large part of them, if not the majority, arise out of and are ancillary to one important question, viz., Who were the proper parties, or who was the proper party, to prosecute the suit?

In instituting the suit Wm. P. Linn was made a plaintiff with L. C. Rockwell, and so remained without a challenge or objection, so far as is disclosed by the record of the proceedings had in the district court in the first instance. It is true that the only adjudication in that court was upon a general demurrer to the complaint; but, under our code of practice, the objection that the plaintiff had no legal capacity to sue, or that there was a defect or misjoinder of parties plaintiff or defendant, could have been made and determined upon demurrer. Code, paragraph 55, page 18. This was not done. The question in regard to Linn's being a proper party does not appear to have been raised until after the disposition of the case in this court on writ of error and the death of Linn.

139 Upon its being remanded for further proceedings, the question first arose on motion to substitute the executors in the place of the deceased plaintiff. So far defendants must be held to have acquiesced, if not in the necessity of Linn's being a plaintiff, at least in the propriety of it. No argument or authorities are necessary to show that if Linn was a proper party his executors should have succeeded him. But defendants are not concluded by this apparent acquiescence and failure to raise the question in regard to Linn. The motion to substitute the executors was resisted, and the correctness of the decision of the court was questioned and the question raised by the answer. An exception was taken to the order of the court making the executors plaintiffs, and 60 days given in which to tender the bill of exception. None appears to have been tendered. This should have been done, as the order was not one of those enumerated in the code where a bill of exceptions was unnecessary. But this failure, probably, will not relieve the court from the necessity of an examination, for, as above stated, the same question is raised by the answer.

140 But there arises a difficulty, for it is avowed that Rockwell was improperly a plaintiff, having no legal interest. The same proposition has been presented to the court by motion, and had, after argument, been overruled. In a subsequent paragraph it was averred that the executors were not properly plaintiffs; that the failure to be substituted in time and the application of Rockwell to be allowed to prosecute as sole plaintiff and the order of the court allowing it worked a *retraxit* or a discontinuance on the part of the executors, defendants claiming in effect by their answer that the cause could not proceed at all. Such a position was clearly untenable, certainly anomalous, and an attempt to abate the suit, first, as to one plaintiff, then as to the other, piecemeal. At common law the pleader was required in a plea in abatement not only to show that the parties were not the proper ones, but to show who were. In the language of the books, "to give a better writ." Here the attempt was in effect to bar the suit by matter in abatement, which could hardly be done, even under our civil code.

141 Ordinarily, under our practice, the question of too many plaintiffs or defendants is one of no great importance except in the matter of costs. It can be disposed of at the close of the trial in accordance with the established facts; but in this case it became important on account of the character of some of the plaintiffs as executors, placing defendants under a disability in the way of proof or evidence of their defense.

The contract executed between Linn and defendants had been assigned to Burrell and by Burrell to Rockwell. Whether it could have been by its own terms legally assigned will be discussed hereafter. It was a question that could only be determined upon the trial. Having been assigned for an unquestioned valuable consideration, he had unquestionably such an interest in the subject-matter of the controversy as would make him a proper party, if not an indispensable one, regardless of the character of the assignment

as to whether it was absolute, so as to pass the title, or qualified as being assigned as collateral security; but as to the executors
142 the determination of the question as to the character of the
assignment becomes important—in fact, determines the question of the right to become parties. In the third paragraph of the complaint it is alleged that Linn assigned to Burrell his right, title, and interest in and to the agreement as security for the loan of $2,700, etc.; that Burrell afterwards assigned his right, title, and interest to said contract to Rockwell, "who now holds said contract as collateral security for money theretofore loaned by him to said Wm. P. Linn." In the fifteenth paragraph of the answer it is said: "And defendants further aver, upon information and belief, that the supposed assignment of said contract to said plaintiff was only for the purpose of securing the payment to said Rockwell of certain debts and claims against said Linn," etc. That the contract was assigned by both Linn and Burrell, and that Rockwell took and held it as collateral security is shown by the testimony of Rockwell. It is nowhere shown or claimed that the assignment was absolute, so as to pass the title and invest the holder with the ownership. It was in both instances assigned as security for the payment
143 of a loan of a trifle more than one-half its face. In all trans-
actions of this kind the ultimate object of the inquiry is, What was the understanding and intention of the parties? And when ascertained such intention must control. Where the transaction imports nothing more than giving a security, without a sale or change of title to the property, the law makes it a pledge. In Jones on Pledges and Collateral Securities, par. 17, it is said: "An assignment of securities by a debtor to his creditor is presumed to be as collateral security and not in payment of the debt, in the absence of evidence tending to show an intention that the securities should be applied in satisfaction of the debt, in whole or in part." In section 15: "A bill of sale, absolute in terms, * * * intended only as collateral security, is a pledge, if accompanied by a delivery of the property to the creditor." See Walker *v.* Staples, 5 Allen, 34; Whittaker *v.* Sumner, 20 Pic., 399. "That the assignment is absolute in form is of no consequence as regards the question of intention." Jones, Pledges, par. 17. A transfer absolute upon its
144 face "may be shown by parole evidence to have been exe-
cuted by way of security, and therefore to be a pledge." *Id.* par. 15; Eastman *v.* Avery, 23 Me., 248; Shaw *v.* Wilshire, 65 Me., 485. See also, in equity, Morgan *v.* Dod, 3 Colo., 551.

The fact stated by Rockwell, that he afterwards advanced a larger sum of money and was the real party in interest is unimportant in determining the character of the transaction, so long as it is shown that the nature of the transaction was not changed by a new contract and the absolute title vested in the assignee. Not only does the evidence establish the fact of a pledge as security, but, aside from that, when the question as to whether it was a sale or a pledge is raised, unless the debtor shows by positive evidence that it was intended to be a sale, the inference of law is positive that it was transferred only as collateral security. Leas *v.* James, 10 Serg. & R.,

307; Perit *v.* Pittfield, 5 Rawle, 166; Jones *v.* Johnson, 3 Watts & S., 276. Collateral security is defined by Bouvier as "a separate obligation attached to another contract to guarantee its performance." By Webster, as "a security for the performance of
145 covenants or the payment of money besides the principal security." By Worcester, as "security for the fulfilment of a contract or a pecuniary obligation in addition to the principal security." In Halliday *v.* Holgate, L. R., 3 Exch., 299, it was said by Mr. Justice Willes, "There are three kinds of security. The first is simple lien; the second a mortgage passing a property out and out; the third a security intermediate between a lien and a mortgage, viz., a pledge where by contract a deposit of goods is made a security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt." In all cases of a pledge as collateral security the general property remains in the debtor. The creditor has only a special property, a lien, a right to retain his security until the payment of the debt. When the debt is paid the security reverts. If default is made the assignee can proceed to dispose of the security, discharge his own debt, and the balance, if any, goes to the assignor or debtor. Jones, Chat. Mortg., par. 4; Jones *v.* Baldwin, 12 Pick., 315; Robertson *v.* Wilcox, 36 Conn., 426;
146 Connor *v.* Carpenter, 28 Vt., 237; Trust Co. *v.* Rigdon, 93 Ill., 458. It follows that the transaction in the first instance having been one of pledge as collateral security and never having been changed by subsequent contract and no default having been made and the property of Linn extinguished by sale, he and his estate remain the owner of the contract assigned subject to the lien of Rockwell, and the special property of Rockwell could have been at any time, by becoming due or by consent of parties, extinguished by payment of the amount for which it was held, and that Linn was a proper party during his life, and, having been such, his executors were proper parties after his death. See Gen. St., p. 1058, c. 115, par. 155.

We do not intend to be understood as saying that either Linn or his executors were absolutely indispensable parties, and that Rockwell could not have prosecuted as sole plaintiff, but that Linn, and after him his executors, had a legal right to be parties at their own election. They could not be precluded at the option of de-
147 fendants, nor could their right to be parties be extinguished by the act of Rockwell in asking to be made sole plaintiff and the action of the court in making him so. The ultimate effect of making the executors plaintiffs may have been disastrous to defendants by placing them under a disability in establishing a defense. They were unfortunate in not being able to make their proof by evidence aside from their own, but this grew out of a rule of evidence, not out of the fact of the executors having been *been* parties. Although such was the result of their having been made parties, it could in nowise affect or determine their right to be such and to prosecute the suit.

This, in effect, disposes of the question raised in regard to the assignment of the contract by Linn, defendants contending that by

its terms it prevented any legal transfer, and that Rockwell took nothing by it. The legal effect of the provision in the contract that it should not be assigned must be construed to be that the title to the chose in action should not pass to another, so as to prevent defendants from asserting any equity or defense that might
148 arise between the original parties. In the language of the contract, the object was to prevent its negotiability. This contract was not violated by a pledge as collateral security. The assignees, having only a lien or special property, held it subject to all the existing equities. Such is always the rule in regard to choses in action held as collateral, unless they are negotiable upon their face and are taken out of the rule by the operation of the law merchant. If this is not conclusive of the question, there was evidence, although contradictory, from which the jury might have found, as they evidently did find, that defendants consented to the transfer. Section 1, c. 116, Gen. St., is as follows: "That no party to any civil action, suit, or proceeding or person directly interested in the event thereof shall be allowed to testify therein of his own motion or in his own behalf by virtue of the foregoing section when any adverse party sues or defends * * * as the executor or administrator, heir, legatee, or devisee of any deceased person * * * unless when called as a witness by such
149 adverse party so suing or defending, and also except in the following cases, namely: "The evidence offered by defendants and excluded by the court was not taken out of the general rule by any exception to it. After a careful examination of the testimony offered and excluded we cannot say that the court erred or extended the rule beyond its proper limits; and the rule is a just and salutary one. Finding that the executors were properly made parties and the only evidence offered in support of many of the averments in the answer was that of the defendants, which was properly excluded, disposes of many of the supposed errors. The defense of misrepresentations on the part of Linn in regard to title, rights, and developments of the property sold to induce the purchase was untenable, first, from the character of the conveyance made by Linn; second, from the conduct of defendants after the purchase, which resulted, in law, in affirmance and ratification.

When defendants went into possession and occupation of the property and found they had been deceived by the state-
150 ments of Linn, they could have either rescinded at once or affirmed and brought an action in the nature of an action on the case at common law for damages for the deceit, and recouped or set off such damages against their own obligation to pay. Neither was done. Having entered into the occupation of the property and proceeded to exercise rights of ownership and to deal with it as their own, they were estopped and precluded from asserting the defenses set up except by establishing by evidence the modification of the contract as alleged, which, in effect, would have been the abrogation of the old contract entirely and the substitution of a new and different one. Such alleged contract not having been reduced to

writing and defendants having no evidence but their own to establish it, and that being inadmissible, the several defenses failed as against Linn's executors. As to Rockwell, there was evidence before the jury sufficient to warrant it in saying that defendants, failing to notify Burrell and Rockwell of their supposed defenses against Linn when applied to for information, were estopped
151 by their own conduct.

The other and remaining errors assigned were predicated upon the supposed fact that the executors were erroneously made parties and defendants erroneously precluded from making the proof of the alleged new contract, and hence are disposed of in our view of the case The defendants having failed to establish their defense by competent testimony—in fact, having been prevented from putting in any testimony by reason of its character to support the averments in the answer—the court below was warranted in finding that the matters relied upon had been considered and determined by this court on error in the former case and were *res adjudicata*, and in so regarding and treating them. Although, as before stated, the defendants, by the course pursued and the rulings of the court, had been placed at a disadvantage, yet this resulted not from the erroneous acts or rulings of the court, but was the unfortunate result of the failing to procure competent evidence—a result quite frequent in the history of judicial proceedings.
152 The judgment should be affirmed.

Pattison, C., concurs; Richmond, C; dissents.

Per curiam: For the reasons stated in the foregoing opinion the judgment is affirmed.

STATE OF COLORADO—*ss*:

In the Supreme Court of the State of Colorado.

HUGH BUTLER and CHARLES W. WRIGHT, Appellants, *vs.* DAVID A. GAGE and NATHAN S. HURD, Executors of the last will and testament of WILLIAM P. LINN, deceased, and LEWIS C. ROCKWELL, Appellees.	Petition for Writ of Error to the Supreme Court of the United States.

To the Hon. J. C. HELM, Chief Justice of the Supreme Court of the State of Colorado:

Your petitioners, HUGH BUTLER and CHARLES W. WRIGHT, respectfully represent:

First—That a judgment was recovered against them in favor of David A. Gage and Nathan S. Hurd, executors, etc., and Lewis C. Rockwell, in the District Court of Lake county, in the State of Colorado, for the sum of $9,008.33, and costs of suit, on the twenty-ninth day of December, 1887, from which judgment your petitioners prayed and obtained an appeal on the eighth day of January, 1888, to the Supreme Court of the State of Colorado; and thereafter the said appeal was duly perfected, and the said cause and the record thereof were duly removed to the said Supreme Court for re-examination and adjudication.

Second—That thereafter, and while said appeal was duly pending in said Court, to-wit: On the.........day of................, 1889, an order was made by said Court assigning said appeal and said cause to the Supreme Court Commission, a tribunal organized and created under and pursuant to statutes of the State of Colorado, for hearing and consideration, and for the purpose of advising said Supreme Court what judgment should be rendered and pronounced in said cause.

Third—That pursuant to said order and assignment, said appeal and said cause were, on the.........day of..............., argued orally as well as on printed briefs before said Supreme Court Commission; and thereafter two of the members of said commission, reported to said Supreme Court an opinion in writing to the effect that said judgment should be affirmed, the other member of said Commission dissenting therefrom, and advising that said judgment be reversed.

Fourth—That afterwards, and on the twenty-fourth day of December, 1889, the said Supreme Court approved and affirmed the report of the majority of said Commission, affirming said judgment.

Fifth—That thereafter, on the..........day of January, 1890, and within the time limited and allowed by the standing rules of said Supreme Court in which to file petitions for re-hearing, your petitioners filed a petition for re-hearing in this cause.

Sixth—That subsequently, and on the twenty-eighth day of March, 1890, said petition for re-hearing was denied.

Seventh—That on or about the........day of.............., in a certain other cause pending in said Supreme Court, which had been referred to, heard and decided by said Commission, the question was raised on the petition for re-hearing therein, that said Commission was an illegal and unconstitutional tribunal, and had no power or authority to hear or determine the causes pending in said Supreme Court, nor any power to advise or recommend to said Supreme Court what judgment should be given in any such causes, nor had the said Supreme Court the right to consider and act upon such opinion of the Commission in making and finding its judgment, or in giving its opinion in any of such causes and appeals, and a day, to wit: the..........day of............, was fixed for the argument of such questions, and on the day so fixed, the said questions were duly argued and considered by the Court, and taken under advisement.

Eighth—That on the said........day of.............., your petitioners, being informed and believing that no remittitur or mandate had yet issued from said Supreme Court in this cause, remanding it to the said District Court of Lake county for enforcement or execution, moved and requested said Court that such remittitur or mandate be withheld and retained until the said questions as to the legality and constitutionality of said Commission should be heard and determined by said Supreme Court as aforesaid, and the said Court, believing and being informed that no remittitur or mandate had then issued in this cause, ordered that said remittitur or mandate be accordingly withheld.

Ninth—That subsequently it appeared that a mandate had issued and had been delivered in said cause to the attorney for appellees, and when such discovery was made by the clerk of said Court, he recalled the same and the same was returned to him by the said attorney; whereupon a motion was made by said appellees to vacate the previous order of this Court, withholding and retaining the same.

Tenth—That on the ---- day of ---------, 1890, said Supreme Court announced opinions on the said petition for re-hearing in the other cause before mentioned, and decided that the other causes assigned for a re-hearing in said cause on the merits thereof, and regardless of the questions of the illegality and unconstitutionality of said Commission, granted the petition for re-hearing in said cause, and delivered opinions all in effect declaring and deciding that the said questions concerning the illegality and unconstitutionality of said Commission could not be raised and decided in that proceeding. and on the same day, pursuant to the said motion theretofore made by appellees, vacated and set aside its former order withholding or detaining the remittitur or mandate herein, and ordered a remittitur to issue

Eleventh—That on said day, your petitioners made and caused to be filed a request in writing in said cause, to withhold said remittitur and to grant an oral argument on the merits of the appeal and of this said cause before said Supreme Court.

Twelfth—That afterwards, and on the seventeenth day of May, 1890, said motion and request were denied, and oral argument to and before said Court on the merits of said appeal and the controversy therein involved was denied by said Court.

Thirteenth—That said request by your petitioners, and the refusal of the said Supreme Court to grant the same and to hear an oral argument of said cause drew in question the constitutionality of the statutes of the State of Colorado, entitled "An act to regulate the practice in the Supreme Court; appointing commissioners therefor, fixing their salary and defining their duties," approved March 7, 1887; and a certain other act entitled "An act providing for a Supreme Court Commission," approved April 1, 1889; in that by the said statutes and the construction placed thereon and the practice adopted thereunder by said Supreme Court, deprived litigants and suitors in said Supreme Court of their right to have their appeals and writs of error and other judicial controversies to be tried before, heard and decided by said Supreme Court, and because the same are repugnant to and inconsistent with and forbidden by the fourteenth Amendment to the Constitution of the United

States, which provides that "no state shall make or enforce any law which shall prejudice the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and that said decision in this cause in effect sustains the validity of said statutes so drawn in question.

Fourteenth—That said judgment of said Supreme Court is final, and nothing remains to be done therein except to issue execution thereon, for the satisfaction and enforcement of the same.

Wherefore your petitioners pray, that writ of error be allowed from the Supreme Court of the United States to the said Supreme Court of the state of Colorado, pursuant to the statutes and the rules and practice of the Supreme Court of the United States in respect thereto, and your orators will ever pray, &c.

(Signed) HUGH BUTLER,
Attorney for Petitioners.

STATE OF COLORADO, }
COUNTY OF ARAPAHOE, } *ss.*

Hugh Butler, being first duly sworn, deposes and says: that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein set forth are true, as he verily believes.

Subscribed and sworn to before me this 27th day of May, 1890.

(Signed) HUGH BUTLER.

STATE OF COLORADO.

Subscribed and sworn to before me this twenty-seventh day of May, A. D. 1890.

JAMES A. MILLER,
Clerk Supreme Court.
By JAMES PERCHARD, *Deputy.*

STATE OF COLORADO.

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said Court and that the same be made a *supersedeas*, the bond in the penal sum of sixteen thousand dollars herewith presented, being approved.

In testimony whereof, witness my hand this twenty-seventh day of May, A. D. 1890, the Chief Justice being absent.

(Signed) CHAS. D. HAYT,
Presiding Judge of the Supreme Court of the State of Colorado.

Office Supreme Court U. S.
FILED.
JAN 5 1891
JAMES. H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HUGH BUTLER and CHAS. W. WRIGHT,
Plaintiffs in Error,
vs.
GEORGE W. GAGE and NATHAN S. HURD, Executors of W. P. LINN, deceased, and LEWIS C. ROCKWELL,
Defendants in Error.

BRIEF ON DEFENDANTS' MOTION TO DISMISS.

HUGH BUTLER,
Solicitor for Plaintiffs in Error.

APP, QUINER & CARTER, LAW PRINTERS, 1411 LAWRENCE ST.

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Defendants in Error.

BRIEF ON DEFENDANTS' MOTION TO DISMISS.

Two questions are presented by the motion to dismiss. The first question relates to the granting of the writ and the signing of the citation by the "presiding judge" instead of the Chief Justice of the Supreme Court of Colorado.

The objection is purely technical; nevertheless, if well founded, it must prevail.

After briefly discussing the objections, counsel for defendants in error concludes his argument on that question by saying: "But inasmuch as the dismissal of this writ for the above reasons would perhaps not bar another, I desire the Court to pass upon the other portion of this motion, which challenges the right of plaintiffs in error to bring the judgment to this Court for review, and will therefore discuss that part of the motion."

This leaves us in doubt whether he means to press the objections, because he confesses that if the writ be dismissed for such reasons, such dismissal would probably not be a bar to another writ, and he therefore adds that he desires the Court to pass upon the other portion of the motion.

If the objections be sustained, there would be nothing left to discuss or to be decided. The counsel for defendants in error does not present the question in alternative form, as is contemplated by the rules of this Court permitting a motion to affirm to be united with a motion to dismiss for want of jurisdiction. In such case, the motion to affirm is entertained only if it be held that the motion to dismiss is not well taken, but here counsel intimates that in any event he desires the Court "to pass upon the other portion of this motion, which challenges the right of plaintiffs in error to bring the judgment to this Court for review;" which request necessarily implies a waiver of his first objection. However, as something has been said in support of the objections, I will briefly refer to them.

His argument is, that at the time this writ was allowed, the Supreme Court of Colorado consisted of three judges, one of whom is styled Chief Justice, and that the writ should have been allowed and citation signed by the Chief Justice. At the time the writ was allowed Hon. J. C. Helm was Chief Justice, and Hons. V. A. Elliott and C. D. Hayt were associate justices. The Chief Justice had the shortest time to serve. Next to him in shortness of service was Judge Elliott, Judge Hayt having the longest term. But for the peculiar wording of the provision of the Constitution, quoted by counsel for defendant in error, Justice Elliott, having the shortest time to serve, would, in case of the death, resignation or disability of Judge Helm, become Chief Justice, but it so happens that Judge Elliott was elected to fill a vacancy and he comes within the exclusionary principle defined by the words, "not holding his office by appointment or elected to fill a vacancy." It follows, therefore, that Judge Hayt was next in the order of succession, though having a longer time to serve.

This construction was adopted by the judges themselves. The same question arose years ago. In 1883, upon the retirement of Chief Justice Elbert, at the expiration of his term, Justice Beck became Chief Justice, although Justice Stone then had the shortest term of service, but he had been elected to fill a vacancy.

Thus it followed that at the date when the writ of error was allowed, Justice Hayt was the next in succession. Had a vacancy then occurred, it would have been filled immediately by the succession of Justice Hayt; but there was no vacancy. Justice Helm, though temporarily absent from the State, was still Chief Justice. The two judges remaining constituted a quorum. The Court was still intact, but neither of the remaining judges was Chief Justice. One was empowered to proceed and act in the place and stead of the Chief

Justice. Though not in name he was to all intents and purposes Chief Justice, temporarily invested with all the powers and burdened with all the duties which belong to the office of Chief Justice.

This leads to the inquiry, what was the proper designation of the Judge who temporarily filled the place and exercised the powers of the Chief Justice? The learned counsel for defendants in error says: "I do not know by what authority Justice Hayt styled himself 'Presiding Judge of the Supreme Court of the State of Colorado.' It is a title unknown to the laws of Colorado."

The authority was given by Section 8 of Article 6 of the Constitution already quoted. It provides:

> "The judges of the Supreme Court shall, immediatly after the first election under this Constitution, to be classified by lot * * * the Judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the Chief Justice and shall preside at all terms of the Supreme Court, *and in case of his absence the Judge having in like manner the next shortest term to serve shall proceed in his stead.*"

What better designation can be given in such case than the Presiding Judge? As already shown, the temporary absence of the Chief Justice does not vacate the office, and it follows that the person who temporarily fills the office must have some official designation. If he proceeds in the stead of the Chief Justice, why not call him Presiding Judge? His former designation of associate justice would not be appropriate, because it would not distinguish him from the other associate justice. As he is the one of the two judges authorized to preside, it seems not only appropriate but necessary to style him "the Presiding Judge."

Counsel then contends that in case there was not *eo nomine* a Chief Justice, there could be no writ unless allowed by a justice of this Court, and he cites *Bartmeyer vs. Iowa, 14 Wallace, 26.* In that case, the writ was allowed and the citation signed by one of the three associate justices. The act of one justice, under the the circumstances, was held not to be the act of the Court. None of the three associate justices was authorized to speak or act for the Court in such matters. The representative of the Court, designated by statute for that purpose, was the Chief Justice, the Chief Judge or Chancellor. The language of the statute is general and comprehensive. It did not undertake to designate certain officials by name, but rather by general language to cover the diversity of names and designations of judges and chancellors in different states. The plain purport and intent of the statute was to empower the principal judge or chancellor, no matter by what name called, to sign the citation. The question of title was unimportant. It was simply required that the writ be signed by the principal or chief judge or chancellor.

The question then recurs, who was the Chief Judge of the Supreme Court of Colorado on the twenty-seventh day of May, 1890?

Chief Justice Helm was then absent from the State. Did the absence of Judge Helm leave the Court without a Chief Judge? If so, it followed that the Supreme Court, though possessed of a quorum, and able to transact all business and to exercise its full powers in all cases, would be powerless in this. Nothing can be found in Bartmeyer vs. Iowa to sanction such a doctrine, productive of such harsh results. In the absence of the Chief Justice, the person who filled his place and who styled himself Presiding Judge was then the principal judge of the Court and authorized to act for it in this as in any other matter.

II.

The second objection challenges the jurisdiction of this Court to review the judgment of the Supreme Court of the State of Colorado in this class of cases. It is said in the petition for the writ of error, which is part of the record herein, that a judgment for nine thousand and odd dollars was rendered against plaintiffs in error in one of the District Courts of the State in December, 1887, from which they prayed and obtained an appeal to the Supreme Court of the State. The Supreme Court of the State was the proper and only proper appellate tribunal by which the record and judgment could be reviewed. The Constitution which was adopted in 1876 and under which the State was admitted declared that the judicial power of the State was vested in a Supreme Court, District Court, and so on, and further declared that the Supreme Court should have appellate jurisdiction which should extend all over the State. In 1886, the sections were amended and it was then declared (section one,) "the judicial power of the State as to matters of law and equity, except as in the Constitution otherwise provided, shall be vested in a Supreme Court, District Courts, County Courts, Justices of the Peace and such other Courts as may be provided by law. (Laws of 1887, page 483.)

Section two of the original Constitution was left intact, and it was in the following words:

> "The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, and shall have general superintending control over all inferior Courts under such regulations and limitations as may be prescribed by law."
> —Article VI, Section 2.

Thus it will be seen that under the original Constitution, appellate jurisdiction was vested only in the Supreme Court of the State, and the superintending control over all the inferior Courts of the State was also lodged in the same Court.

The first General Assembly, conformably to the direction of the Constitution, passed statutes allowing appeals from all judgments rendered by any District Court in which judgment was given for the sum of twenty dollars or more, exclusive of costs. After hearing such appeal, the Supreme Court had power to affirm the judgment complained of; also, if necessary, to render a final judgment, and, in case of partial reversal, to render proper judgment or to order the Court below to render such judgment as it should direct. Civil Code, 1883, Sec. 418, (29.)

Aggrieved suitors were thus given a substantial right in the form of a substantial remedy by appeal to the Court designated and created by the Constitution for such purpose.

In 1887, under the pretence that the Supreme Court was unable to keep up with the volume of business pressing upon it, the Legislature passed a statute authorizing the appointment of three Supreme Court commissioners for the period of two years, unless sooner relieved or discharged. In 1889, a similar statute was enacted, authorizing the appointment of like commissioners for the period of four years, unless sooner relieved.

Three commissioners were appointed under the act of 1887 and served for two years, and upon the expiry of their appointment, three commissioners were appointed under the act of 1889 for four years, and they are now acting as such commissioners. While thus acting, the appeal herein was assigned to them by the Supreme Court.

In the brief of defendants in error, it is asserted in substance that the cause was advanced and was sent to the commissioners on motion of the plaintiffs in error, and from that appearance of the record, he attempts to raise an estoppel.

It is true that the record entry to which counsel refers does say that the cause was advanced and assigned to the commission on motion of appellants, but the learned counsel well knew that the fact was otherwise. He well knew that the motion referred to was made by appellees, for whom he appeared, and that his motion was *ex parte*, and that appellants knew nothing of the motion or request or of the action of the Court thereon until they were subsequently notified that the order had been made.

In proof of this statement, attention is called to the affidavit of the clerk, filed herewith, and also a copy of the motion on which the Court acted.

Even if the fact were that the cause had been assigned to the commission on motion of plaintiffs in error, there could be no estoppel, because consent could never supply the want of jurisdiction in such cases, but the statement indicating such assent, if not denied or explained, might create a prejudice against this contention.

The merits of the appeal, under the circumstances stated, were argued before the commissioners, and two of them decided in favor of affirming the judgment. Their report was made to the Supreme Court, but the contents and effect of such report were unknown to the parties until announced by the Supreme Court in affirming the report and thereby affirming the judgment. An application was then made for rehearing, and a brief was filed in support of the petition therefor.

Up to this time, no attack had been made against the authority of the commission or against the right of the Court to accept and adopt the work of the commission. Immediately after denying the petition for rehearing in this case, objection was made in another case, that the Supreme Court Commission, so-called, had no right or power to decide judicial controversies, and that the Supreme Court had no right or power to base its final judgment on the report or recommendation of the commission. These questions were raised in the petition for rehearing in the case of DeVotie vs. McGerr, and were passed on by the Court, each Judge giving an opinion, all of which are reported in 23 Pacific Reporter, 980.

Pending the consideration of such questions, in that case an order was made in this, withholding the remittur, the purpose of such order being to await the determination of the questions in DeVotie vs. McGerr.

On the same day that the opinions were announced in DeVotie vs. McGerr, the order herein theretofore made, withholding the remittur, was vacated, thus leaving the judgment in a condition to be enforced. Thereupon plaintiffs in error made another motion to withhold such remittitur and for an oral argument on the merits of the appeal, before the Court, but this motion was also denied, and hence, as the only remedy left, this writ was sued out.

The substance of the objection now made is that the pleadings do not present a federal question; that the petition for the writ does not show that a federal question was involved in the decision of the State Court, and that plaintiffs in error have been denied no right under the Fourteenth amendment to the Constitution.

It is first argued that in the forty-three assignments of error in the State Supreme Court, no federal question was raised. It is conceded that if the appeal had been heard and decided by the Supreme Court, without the intervention and independently of the so-called commission, its decision would have been final and there would be no federal question, but the complaint is, that the right which plaintiffs in error had to a hearing and trial in and decision after such trial by the Supreme Court of the State was ignored or denied to them. This was sought to be excused by the State statutes creating the commission. While it was not declared in terms that the statute was either constitutional or unconstitutional, it is apparent and not denied that the statute was made use of, and but for the statute, a hearing and trial by and before the Supreme Court would have followed in regular course.

Although these objections were not at first made, they were presented to the Court in the last motion for an oral argument, and the refusal of the Court to grant a hearing before and a trial by it, when none had been had, could be excused only by the statute referred to. It is impossible, therefore, to consider the excuse without determining the force and effect of that on which it was based, viz: the act creating the commission.

It is not necessary to give this Court jurisdiction that the federal question now presented should have been a part of the original controversy. It is sufficient if, in the course of the procedure, something was done, or threatened, which destroyed or impaired any right or privilege protected by the fourteenth amendment to the Constitution. If the procedure was void because prohibited, and because it amounted to the taking of life or property without "due process of law," this Court has jurisdiction to prevent the threatened wrong, and as a means may use a writ of error in one case or a writ of *habeas corpus* in an other.

In the Medley case, 134 U. S., 160, and in the Kemmler case, 136 id., 436, both writs were resorted to. In neither case did any federal question arise until after trial and conviction, but in both, federal interference was invoked because of acts and procedure subsequent to judgment on the merits.

There remains, therefore, but one question, and that is, Did the Supreme Court of the State of Colorado in this instance by reason of the State Statute of 1889, deny to the plaintiffs in error any right or privilege secured and protected by the fourteenth amendment?

Counsel for defendants in error argues that this Court has no jurisdiction to review the judgment of a State Court as to the constitutionality of a State Statute. This is admitted where the statute deals with a question not within the purview of the Federal Constitution, but the writ in this case was not provided or obtained on the theory that the statute was obnoxious to the State Constitution. True, it is alleged in the petition for the writ that the constitutionality of the statute was drawn in question, but it was also alleged that the statute was repugnant to the fourteenth amendment to the Federal Constitution.

The question whether the act is in violation of the State Constitution is an incidental one, perhaps, so far as this Court is concerned, but it cannot be said that because the statute is assailable on that ground it is not also open to other objections. Whether opposed to or consistant with the State Constitution, the question remains, is it in conflict with the fourteenth amendment in any particular? And in the consideration of this question, if it shall appear that it is clearly in violation of the State Constitution, the reasoning which leads to that conclusion, may carry us well forward in reaching the other, that it is also opposed to and prohibited by the fourteenth amendment to the Constitution of the United States. Indeed, if the right assailed is of a fundamental character, one which existed and was recognized at common law, before the adoption of the Federal Constitution, and also recognized by the Constitution of this State, and the State Statute undertakes to destroy or impair it, this Court will have the right to pass upon its validity, even under the State Constitution.

This brings us to the consideration of the meaning and the effect to be given in this case to to the phrase, "due process of law," or, "the law of the land."

In the latest case upon that question, *In re* Kemmler, *supra*, this Court said:

> "As due process of law in the fifth amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law, so, in the fourteenth amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life; liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights. * * * * But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order."

As to all matters beyond the scope of the Federal Constitution, the State government is supreme, but when the State government attempts to deal with a fundamental principle within the scope of the Federal Constitution, the act, if assailed, must be defended both under the Constitution of the United States and the Constitution of the State, because, both, as to that question, constitute the law of the land.

It can hardly be necessary to argue that the right here involved is of a very fundamental character—as much so as if it affected life or liberty, instead of property. The one perhaps is more sacred than the other, but they are placed in the same category of protection.

The right denied in this case was a review by a Court, created and existing under the law of the land, and created for the purpose of determining such controversies. The statute under which the procedure was begun provided both for appeals and writs of error. In such cases as this, the appeal was a synonymous remedy with the writ of error, and the question stands precisely as if the common law writ of error had been resorted to instead of the statutory remedy of appeal.

The writ of error was recognized by the common law, and the right to complain of a judgment rendered by a court of original jurisdiction and to have the same reviewed by the writ of error was one of the prominent and cherished features of the English system of jurisprudence, which was borrowed and adopted by the people of the United States before the adoption of the Federal Constitution. In England, and frequently in this country, it was said to be a writ of right. Its use might be abridged and its operation limited by statute, as it frequently was, but all the legislation upon the question of a writ of error was had upon the theory, not that the right and the writ were created, but that it was regulated and defined by the legislation concerning it.

It is not argued that the writ of error, though denominated a writ of right, could not be taken away, but it is submitted that it could not be taken away or vitally impaired unless some other remedy, supposed to be equally as good, were provided in its stead. The vital principle represented by the writ was, that in all judgments affecting property growing out of judicial controversies in the various States, an opportunity should be given to the aggrieved suitor in a Court of errors or in some Court of appellate jurisdiction, capable of granting some relief.

This writ was in existence and was fully recognized in Colorado during its territorial existence and when it was admitted as a State. The Constitution framed in 1876 recognized the writ; it thus became at once the law of the land. The Constitution was expected or at least was assumed to be satisfactory to the Federal Government when Colorado was admitted and received as a State. The fourteenth amendment to the Federal Constitution was then in force, and it provided in terms that no State should deprive any person of life, liberty or property without due process of law, so that a fair construction of the phrase, "due process of law," might be held to reach a statute plainly in violation of the State Constitution.

But it is not necessary to rest the claim for the jurisdiction of this Court on that line of reasoning. It is only necessary to consider the nature of the right which was assailed or denied in this case.

A judgment had been rendered against the plaintiffs in error for a considerable sum of money by a Court of original jurisdiction. The process of law was not necessarily ended by such determination. There remains in this, as there does in other States, and in the country from which our system of jnrisprudence was borrowed, a right to continue the controversy for the purpose of determining in another and higher Court the legality and justice of the judgment complained of. Any statute or course of action which denied this remedy or took away the opportunity, was one which destroyed a part of what was fairly termed "due process of law." In such case, the aggrieved party was entitled to another trial—a trial perhaps of a different character, but nevertheless a trial by the highest Court of the State, created by the Constitution.

The statute in question is one which, if followed or enforced, prevented such a trial, and thereby deprived plaintiffs in error of a substantial right. It is argued here that the judgment has become the judgment of the Court, but this is denied.

The question as to the necessity for a trial is embraced in the definition of the law of the land, and is well stated by Mr. Cooley:

> "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case. 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.'"
>
> *Cooley's Const., Lim., 432.*

Testing the proceeding in this case by the definition quoted, what have we here? The petition for the writ for the purpose of this question, must be taken as true. It is averred in it that this case was not heard or tried by the Supreme Court of the State, but on the contrary, it was heard only by the so called Supreme Court Commission. The members of that body, at the close of the argument made before them, assumed to consider and decide the merits of the controversy. This hearing was wholly unknown to the Supreme Court. After the Commissioners had reached a determination, they reported to the Supreme Court in the form of an opinion their conclusions as to the merits, and in such opinion, recommended to the Supreme Court the judgment which it should give. No other hearing was had before the Supreme Court.

As already stated, the parties to the controverser had no knowledge and no means of knowledge, as to the nature and effect of the report by the commissioners, until it was acted upon and announced by the Supreme Court when it formally delivered judgment affirming the judgment appealed from.

Thus there was no hearing or trial, in the correct sense. True, it may have been that the Supreme Court read as fully and as diligently as did the Commission the record and printed briefs in the case, and that they were not materially aided or influenced in their conclusions by the labors and recommendations of the commission, but that is hardly to be inferred. At any rate the judgment was pronounced without any opportunity on their part to hear the oral argument at the bar of the commission.

This, however, perhaps is not the occasion for the discussion of this question, except for the purpose of showing the nature of the right involved. But it may also be said that the statute was obnoxious to another objection as well, because the effect of the law was to deny to persons within the jurisdiction of the United States the equal protection of the laws. Causes brought to the Supreme Court, either by appeal or writ of error, were first placed upon its docket, and afterwards, by the determination of law or chance, some were to be heard by the Supreme Court itself in the regular and orthodox way, and others, by lot or chance, were to be sent to some extraneous and unauthorized tribunal, and after a preliminary examination by such tribunal, in many cases being in fact the main and decisive one, the case was heard and determined, not by the Supreme Court, but by this commission, annexed to and inferior to it.

Now, can it be said in such case, that the declaration by the Supreme Court that such tribunal has the right to share and exercise its functions, shall conclude a party clearly entitled to the judgment of the Supreme Court itself, or shall it even be said that the refusal of the Supreme Court to speak decisively when the question is legitimately put to it, whether the statute in question is constitutional or not, leaves the injured party without other remedy? Can it be in such case that this Court has no jurisdiction and can grant no relief, merely because the Supreme Court of the State has said that the statute is constitutional or has refused to say that it is unconstitutional?

If a statute had been enacted by the legislature of the State providing that every appeal or writ of error brought to the Supreme Court of the State, or one-half of all its cases, to be determined in some way by lot, design or chance, should be sent to such an unauthorized body as the commission, and the other half permitted to remain with the Supreme Court, would it be said that such a statute was obnoxious merely to the Constitution of the State? Could it be successfully denied that such a statute was an encroachment upon the dearest rights belonging to a citizen of the United States as well as of the State, and one within the general purview and scope of the fourteenth amendment to the Federal Constitution? And the effect, as illustrated by this case, is the same as in the case supposed.

It is, therefore, respectfully submitted that the question here involved is one of a substantial character, and that its determination is not to be confided to the Supreme Court of the State only, and certainly jurisdiction is not to be refused here, after the Supreme Court has declined proper relief, and has refused to furnish that protection demanded by "the law of the land."

Respectfully submitted,
HUGH BUTLER,
Solicitor for Plaintiffs in Error.

APPENDIX.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HUGH BUTLER and
CHARLES W. WRIGHT,
Plaintiffs in Error,

vs.

GEORGE W. GAGE and NATHAN S. HURD, Executors
of W. P. LINN, deceased, and
LEWIS C. ROCKWELL,
Defendants in Error.

JAMES PERCHARD, being first duly sworn, deposes and says: That he is the Deputy Clerk of the Supreme Court of the State of Colorado; that the paper annexed hereto is a correct copy of the original motion which was made and filed in the cause and appeal in the Supreme Court of said State between the parties hereto; that said original paper was type written, except certain words, to-wit: "And set for oral argument," which words were written with pen and ink, and in the handwriting of L. C. Rockwell, Esquire, one of the attorneys for appellees in said suit.

Affiant further states that the record entry in said cause, which is to the effect that the said cause was advanced for hearing and assigned to the Commission for hearing on motion of appellants, is erroneous, in that the word "appellants" was, by mistake, written and used for the word "appellees," the fact being that the said motion was made by the appellees and not the appellants therein.

James Perchard.

Subscribed and sworn to before me this thirtieth day of December, A. D. 1890.

My commission expires Sept. 16, 1893.

[SEAL.] W. J. Edwards,
Notary Public.

STATE OF COLORADO.

In the Supreme Court thereof.

Hugh Butler, et al., *Appellants,* vs. L. C. Rockwell, et al., *Appellees.*	*No. 2269.*

Now comes Nathan S. Hurd, surviving executor under the last will and testament of William P. Lynn, deceased, by Clinton Reed, his attorney, and asks to have this case advanced to the head of the submission docket under rule 53 of this Court, and set for oral argument, and for this motion the following reasons are assigned:

I. Because this cause was submitted under the rules of this Court August 3, 1888.

II. Because appellee as executor as aforesaid has the right to have this cause advanced under said rule of Court.

CLINTON REED,
Attorney for N. S. Hurd, Executor.

I consent to the advancement of this cause.

L. C. ROCKWELL,
Attorney, pro se.

The above is endorsed as follows:

2269—State of Colorado—In the Supreme Court—Hugh Butler, *et al.* vs. L. C. Rockwell, *et al.* Motion to advance the case—Filed in Supreme Court, September 10, 1889, James A. Miller, Clerk. Clinton Reed, attorney for N. S. Hurd—L. C. Rockwell, attorney, *pro se.*

Office Supreme Court U. S.
FILED,
DEC 8 1890
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1342.

HUGH BUTLER AND CHARLES W. WRIGHT, PLAINTIFFS IN ERROR.

vs.

NATHAN S. HURD, SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM P. LINN, DECEASED, AND LEWIS C. ROCKWELL, DEFENDANTS IN ERROR.

MOTION TO DISMISS OF AFFIRM AND BRIEF IN SUPPORT THEREOF.

BY L. C. ROCKWELL, ATTORNEY FOR DEFENDANTS IN ERROR.

No. 1342.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1890.

HUGH BUTLER AND
CHARLES W. WRIGHT,
Plaintiffs in Error.
vs.
NATHAN S. HURD, surviving
executor of the estate of WILLIAM
P. LINN, deceased, and LEWIS
C. ROCKWELL,
Defendants in Error.

To Hugh Butler and Charles W. Wright, Plaintiffs in Error, and to Hugh Butler, Esq., their attorney:

GENTLEMEN:—Please take notice that on Monday, the twenty-second day of December, 1890, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the following motions to dismiss or affirm will be called up in the Supreme Court of the United States and submitted for decision. In support of which motions the following brief is made.

L. C. ROCKWELL,
Attorney for Defendants in Error.

DENVER, Nov. 28, 1880.

Received a copy of the above notice and following brief this twenty-eighth day of November, 1890, at Denver, Colorado.

Attorney for Plaintiffs in Error.

No. 1342.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1890.

HUGH BUTLER AND
CHARLES W. WRIGHT,
Plaintiffs in Error,
vs.
NATHAN S. HURD, surviving executor of WILLIAM P. LINN, deceased, and LEWIS C. ROCKWELL,
Defendants in Error.

Come now the defendants in error, by Lewis C. Rockwell *pro se* and as attorney for Nathan S. Hurd, surviving executor of the last will and testament of William P. Linn, deceased, and appearing specially for this motion and this motion only, and moves this Honorable Court to dismiss this writ of error and order its clerk to issue the proper mandate to the Supreme Court of the State of Colorado showing this cause is dismissed. But should this Court hold it had jurisdiction of this action, then and in that case defendants in error moves this judgment be affirmed on the ground that it is manifest the writ of error was taken for delay only and that the question on which the jurisdiction of this Court depends, is so frivolous as not to need further argument. And for these motions the following reasons are assigned:

First—Because the writ of error was not allowed by, neither was the citation signed by the Honorable J. C. Helm, Chief Justice of the Supreme Court of the State of Colorado.

Second—Because the writ of error was allowed by and the citation was signed by Honorable Charles D. Hayt, one of the associate justices of the Supreme Court of the State of Colorado, styling himself "Presiding judge of the Supreme Court of the State of Colorado." And this Court has no jurisdiction of this cause nor of the defendants in error.

Third—Because no federal question was raised by or presented in the Court below, neither does any such question appear in the record. The pleadings do not attempt to raise or draw in question the validity of a treaty or statute of, nor an authority exercised under the United States, neither is there drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, neither did defendants below claim any title, right, privilege, or immunity under the Constitution, or any treaty, statute of or commission held or authority exercised under the United States, as provided in section 709 of the R. S. U. S., and this Court has no jurisdiction to review the judgment sought to be brought here by this writ of error.

Fourth—Because the petition for a writ of error does not allege, set up or show any federal question was involved in the suit decided by the State Court.

Fifth—Because plaintiffs in error have been denied no right, privilege, or immunity, arising under or guaranteed by the Fourteenth Amendment to the Constitution of the United States, neither have they been deprived of property without due process of law under said constitutional amendment.

L. C. ROCKWELL,
Attorney for Defendants in Error.

FACTS.

For the purpose of this motion the whole record has been printed saving and excepting the testimony and the petitions and orders made thereon, whereby Linn's executors were made parties. Those things relating purely to matters of practice could not be noticed on this motion, and too, the errors (if any) on which the jurisdiction of this Court depends were committed, it is said, by the Supreme Court of the State of Colorado after the case had been decided by it *in not allowing an oral argument before that Court after plaintiffs in error had filed a petition for a rehearing and had been heard thereon.* The petition upon which the writ of error was allowed has been inadvertently omitted from the printed transcript, I therefore print it in full in this brief and have asked the Clerk of this Court to insert it in its proper place in the transcript. Such petition being in words and figures following:

STATE OF COLORADO—*ss.*

IN THE SUPREME COURT
OF THE STATE OF COLORADO.

HUGH BUTLER AND CHARLES W. WRIGHT, *Appellants,* *vs.* DAVID A. GAGE AND NATHAN S. HURD, *Executors of the last Will and Testament of* WILLIAM P. LINN, *deceased, and* LEWIS C. ROCKWELL, *Appellees.*	*Petition for Writ of Error to the Supreme Court of the United States.*

To the HON. J. C. HELM,
Chief Justice of the Supreme Court
of the State of Colorado:

Your petitioners, HUGH BUTLER and CHARLES W. WRIGHT, respectfully represent:

First—That a judgment was recovered against them in favor of David A. Gage and Nathan S. Hurd, executors, etc., and Lewis C. Rockwell, in the District Court of Lake county, in the State of Colorado, for the sum of $9,008.33, and costs of suit, on the twenty-ninth day of December, 1887, from which judgment your petitioners prayed and obtained an appeal on the eighth day of January, 1888, to the Supreme Court of the State of Colorado; and thereafter the said appeal was duly perfected, and the said cause and the record thereof were duly removed to the said Supreme Court for re-examination and adjudication.

Second—That thereafter, and while said appeal was duly pending in said Court, to-wit: On the.............. day of...................., 1889, an order was made by said

Court assigning said appeal and said cause to the Supreme Court Commission, a tribunal organized and created under and pursuant to statutes of the State of Colorado, for hearing and consideration, and for the purpose of advising said Supreme Court what judgment should be rendered and pronounced in said cause.

Third—That pursuant to said order and assignment, said appeal and said cause were, on the---------- day of---------------, argued orally as well as on printed briefs before said Supreme Court Commission; and thereafter two of the members of said commission reported to said Supreme Court an opinion in writing to the effect that said judgment should be affirmed, the other member of said Commission dissenting therefrom, and advising that said judgment be reversed.

Fourth—That afterwards, and on the twenty-fourth day of December, 1889, the said Supreme Court approved and affirmed the report of the majority of said Commission, affirming said judgment.

Fifth—That thereafter, on the---------- day of January, 1890, and within the time limited and allowed by the standing rules of said Supreme Court in which to file petitions for re-hearing, your petitioners filed a petition for re-hearing in this cause.

Sixth—That subsequently, and on the twenty-eighth day of March, 1890, said petition for re-hearing was denied.

Seventh—That on or about the-------- day of------------, in a certain other cause pending in said Supreme Court, which had been referred to, heard and decided by said Commission, the question was raised on the petition for re-hearing therein, that said Commission was an illegal and unconstitutional tribunal, and had no power or authority to hear or determine the causes pending in said Supreme Court, nor any power to advise or recommend to said Supreme Court what judgment should be given in any such causes, nor had the said Supreme Court the right to consider and act upon such opinion of the Commission in making and finding its judgment, or in giving its opinion in any of such causes and appeals, and a day, to wit: the ---------- day of ------------, was fixed for the argument of such questions, and on the day so fixed, the said questions were duly argued and considered by the Court, and taken under advisement.

Eighth—That on the said --------- day of ----------- your petitioners, being informed and believing that no remittitur or mandate had yet issued from said Supreme Court in this cause, remanding it to the said District Court of Lake county for enforcement or execution, moved and requested said Court that such remittitur or mandate be withheld and retained until the said questions as to the legality and constitutionality of said Commission should be heard and determined by said Supreme Court as aforesaid, and the said Court, believing and being informed that no remittitur or mandate had then issued in this cause, ordered that said remittitur or mandate be accordingly withheld.

Ninth—That subsequently it appeared that a mandate had issued and had been delivered in said cause to the attorney for appellees, and when such discovery was made by the clerk of said Court, he recalled the same and the same was returned to him by the said attorney; whereupon a motion was made by said appellees to vacate the previous order of this Court, withholding and retaining the same.

Tenth—That on the ---- day of --------, 1890, said Supreme Court announced opinions on the said petition for re-hearing in the other cause before mentioned; and decided that the other causes assigned for a re-hearing in said cause on the merits thereof, and regardless of the questions of the illegality and unconstitutionality of said Commission, granted the petition for re-hearing in said cause, and delivered opinions all in effect declaring and deciding that the said questions concerning the illegality and unconstitutionality of said Commission could not be raised and decided in that proceeding, and on the same day, pursuant to the said motion theretofore made by appellees, vacated and set aside its former order withholding or detaining the remittitur or mandate herein, and ordered a remittitur to issue

Eleventh—That on said day, your petitioners made and caused to be filed a request in writing in said cause, to withhold said remittitur and to grant an oral argument on the merits of the appeal and of this said cause before said Supreme Court.

Twelfth—That afterwards, and on the seventeenth day of May, 1890, said motion and request were denied, and oral argument to and before said Court on the merits of said appeal and the controversy therein involved was denied by said Court.

Thirteenth—That said request by your petitioners, and the refusal of the said Supreme Court to grant the same and to hear an oral argument of said cause drew in question the constitutionality of the statutes of the State of Colorado, entitled "An act to regulate the practice in the Supreme Court; appointing commissioners therefor, fixing their salary and defining their duties," approved March 7, 1887; and a certain other act entitled "An act providing for a Supreme Court Commission," approved April 1, 1889; in that by the said statutes and the construction placed thereon and the practice adopted thereunder by said Supreme Court, deprived litigants and suitors in said Supreme Court of their right to have their appeals and writs of error and other judicial controversies to be tried before, heard and decided by said Supreme Court, and because the same are repugnant to and inconsistent with and forbidden by the fourteenth Amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall prejudice the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and that said decision in this cause in effect sustains the validity of said statutes so drawn in question.

Fourteenth—That said judgment of said Supreme Court is final, and nothing remains to be done therein except to issue execution thereon, for the satisfaction and enforcement of the same.

Wherefore your petitioners pray, that writ of error be allowed from the Supreme Court of the United States to the said Supreme Court of the state of Colorado, pursuant to the statutes and the rules and practice of the Supreme Court of the United States in respect thereto, and your orators will ever pray, &c.

(Signed) HUGH BUTLER,
Attorney for Petitioners.

STATE OF COLORADO, }
COUNTY OF ARAPAHOE, } *ss.*

Hugh Butler, being first duly sworn, deposes and says: that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein set forth are true, as he verily believes.

Subscribed and sworn to before me this 27th day of May, 1890.

(Signed) HUGH BUTLER.

STATE OF COLORADO.

Subscribed and sworn to before me this twenty-seventh day of May, A. D. 1890.

JAMES A. MILLER,
Clerk Supreme Court.
By JAMES PERCHARD,
Deputy.

STATE OF COLORADO.

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said Court and that the same be made a *supersedeas*, the bond in the penal sum of sixteen thousand dollars herewith presented, being approved.

In testimony whereof, witness my hand this twenty-seventy day of May, A. D. 1800, the Chief Justice being absent.

(Signed) CHAS. D. HAYT,
Presiding Judge of the Supreme Court of the State of Colorado.

ARGUMENT.

Section 5 of article 6 of the constitution of the State of Colorado reads: "The Supreme Court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision."

Section 8 of the same article reads as follows: "The judges of the Supreme Court shall immediately after the first election under this constitution be classified by lot so that one shall hold his office for the term of three years, one for the term of six years, and one for the term of nine years. The lot shall be drawn by the judges, who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the Secretary of State, and filed in his office. The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all terms of the Supreme Court, and, in case of his absence, the judge having in like manner the next shortest term to serve shall preside in his stead."

Section 3226 of chapter 104, entitled "Supreme Court," of the General Statutes of the State of Colorado, p. 939, reads: "All process issued out of the Supreme Court shall bear test in the name of the chief justice * * *"

Section 3228 reads: "The opinion of the justice of the Supreme Court on any matter pending before it, shall be given in writing * * * "

Section 3230 reads: "No Justice of the Supreme Court shall practice as an attorney at-law or solicitor in chancery * * * * ."

I do not know by what authority Justice Hayt styled himself "Presiding Judge of the Supreme Court of the State of Colorado" It is a title unknown to the laws of Colorado. The petition asking for the writ of error is properly addressed to Hon. J. C. Helm, Chief Justice of the Supreme Court of the State of Colorado, and the order allowing the writ recites the absence of the Chief Justice.

This writ is not allowed as a matter of right.

Twitchell *vs.* Commonwealth, 7 Wall, 321;
Spies *vs.* Illinois, 123 U. S., 131.

Therefore it should have been allowed (if at all) by the Chief Justice or by some member of this Honorable Court, and the citation should have been so signed.

The citation bears test in the name of Justice Hayt, that is wrong under the laws of Colorado, which provide that "all process shall bear test in the name of the Chief Justice," supposing he was absent, the writ should have born test in his name.

Section 999 R. S. U. S. " * * * * and when it (meaning a writ of error) is issued by the Supreme Court to a State Court, the citation shall be signed by the Chief Justice * * * * or by a Justice of the Supreme Court of the United States."

In Palmer *vs.* Donner, 7 Wall., 541, the citation was signed by the District Judge. This Court ruled the citation was void.

The case of Bartemeyer, Sr., Plaintiff in Error *vs.* The State of Iowa, 14 Wall. 26. is decisive of my right to have this motion sustained upon this point. There, as here, the Supreme Court of Iowa was composed of a Chief Justice and three associate justices. The writ was allowed by one of the justices and this Court ruled the writ could only be allowed by the Chief Justice of that Court or by a Judge of this Court and inasmuch as the Judge who allows the writ must sign the citation, if Associate Justice Hayt was not authorized to allow the writ, his acts in signing the citation was a nullity, but inasmuch as the dismissal of this writ for the above reasons would perhaps not bar another. I desire the Court to pass upon the other portion of this motion which challenges the right of plaintiffs in error to bring the judgment to this Court for review, and will therefore discuss that part of the motion.

The judgment attempted to be brought here for review, was rendered in an action brought in the name of William P. Linn and Lewis C. Rockwell upon a contract made by said Linn with said Butler and Wright, the plaintiffs in error, for the purchase of an interest in a mining claim, which contract Linn assigned to Rockwell as collateral security for money he borrowed of him. While the action was pending and before judgment, Linn died. The defenses pleaded were:

First—That Linn's executors ought not to have been substituted for him, and that Rockwell did not have such an interest in the contract that he could maintain the action, and that the suit abated by Linn's death.

Second—That in the sale of this property, Linn made certain false representations which induced plaintiffs in error to buy.

Third—That the money under the contract was not due at the time the suit was instituted, because plaintiffs in error had not yet taken the amount of money called for by the contract out of the mine prior to the institution of that action.

Fourth—Statute of limitation.

Certainly no federal question was involved in any of those defenses and when that action got into the State Supreme Court, plaintiffs in error assigned forty-three assignments of error, in not one of which was there a question of federal law involved, neither was any federal question now attempted to be presented, raised, presented or hinted at. A decision in the State Court which involved no question of federal law, is not reviewable here.

Board of Supervisors of Santa Cruz County, plaintiffs in error, *vs.* Santa Cruz R. R. Co., 111 U. S. R., 361;

Chouteau *vs.* Gibson, 111 U. S. R., 200.

The petition for the writ of error conclusively shows plaintiffs in error were denied no right under the laws of the State of Colorado, nor those of the United States. But were the facts as plaintiffs in error allege them to be, this Court has no jurisdiction of this case, because the Supreme Court of Colorado in law rendered the decision affirming the judgment sought to be here reviewed, although the Commissioners wrote the opinion, it was in law the decision of the Supreme Court of Colorado. I shall assume the law creating the Commission was not in conflict with the Constitution of the State of Colorado, and even if it were, this Court has no power to investigate or pass upon that question. This Court can not review a decision that a State law is in conflict with the State Constitution.

Withers *vs.* Buckley, 20 How., 84.
Medberry *vs.* Ohio, 24 How., 413.
Jackson *vs.* Lampshire, 3d Peters, 280.

But plaintiffs in error are estopped by the record from claiming the commission did not have the right to consider their case, and that subsequently the Supreme Court did not examine the opinion and approve of the decision rendered, after the case was put at issue by the joinder in error. [See p. 34, printed transcript.] On September 13, 1889, the record recites *that on motion of appellants*, that case was advanced for hearing and assigned to the Supreme Court commission "for consideration and report and for oral argument at such time as said commission shall order." [P. 36, printed transcript.] Afterwards and upon the twenty-seventh day of September, 1889, it was stipulated between counsel, that oral argument be there had on the sixteenth day of October, 1889, (p. 36, printed transcript) and argument was so had as is shown by the petition for writ of error; and afterwards and upon the twenty-fourth day of December, 1889, the Supreme Court affirmed the judgment and such judgment of affirmance entered at large upon the record. [P. 27, printed transcript.] And afterwards and on January 7, 1890, plaintiffs in error filed their petition for a re-hearing (pp. 37–41, printed transcript), in which they assumed to point out the errors committed in the decision. No intimation is there given the commission had no right to pass upon the case and advise the Supreme Court what judgment ought to be given. At the conclusion of such petition it recites that permission had been given to file a brief in support of such petition for re-hearing, all of which was done; after which and upon the twenty-eighth day of March, 1890, the Supreme Court denied said petition for re-hearing. [P. 42, printed transcript.]

Afterwards, and on May sixteenth, 1890, appellants asked permission to argue the case orally before the Supreme Court, which motion was by the Court denied. [P. 43, printed transcript] It is difficult, indeed, to perceive in what way plaintiffs in error were denied any right in the hearing of their case.

Respectfully submitted,

L. C. ROCKWELL,

Attys. for Defts. in Error.